Supreme Court, U.S.
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No. _____

In the
Supreme Court of the United States

EVAN FERMAINT, Officer
NOBERTO BERCASIO, Officer, and
FRED COFFEY, Officer,
Petitioners,

v.

ROGER FAIRLEY,
and REICHARD GACKOWSKI,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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June 18, 2007

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QUESTIONS PRESENTED

1. Under *Johnson v. Jones*, 515 U.S. 304, 115 S. Ct. 2151, 132 L.Ed.2d 238 (1995), is an appellate court precluded from reviewing the record on an interlocutory appeal in a qualified immunity case?

2. At the time of the alleged harassment, was the law "clearly established" that one co-equal, public employee could be held liable on Constitutional grounds for harassing another co-equal public employee?

PARTIES TO THE PROCEEDING

Pursuant to Rule 14.1(b), the following list identifies all of the parties appearing here and before the United States Court of Appeals for the Seventh Circuit.

The petitioners here and appellants below are Evan Fermaint, Noberto Bercasio, and Fred Coffey.

The respondents here and appellees below are Roger Fairley and Richard Gackowski.

The following parties were defendants in the district court action but did not participate in the appeal to the United States Court of Appeals for the Seventh Circuit: Dennis Andrews, Edward Byrne, Patrick Loizon, Ronald Prohaska, Gregory Ernst, Saul Weinstein, Tim Kaufmann, Gabriel Ochoa, Juan Diaz, Michael Sheahan, and Cook County.

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PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 3a-14a) on rehearing is reported at 482 F.3d 897. The opinion of the court of appeals (App., *infra*, 15a-27a) is reported at 471 F.3d 826. The opinion of the district court (App., *infra*, 28a-65a) is reported at 430 F.Supp.2d 786.

JURISDICTION

The district court had jurisdiction of this case under 28 U.S.C. § 1331. The court of appeals had jurisdiction to review the district court's order under 28 U.S.C. § 1292. The court of appeals' judgment was entered on December 20, 2006. A timely petition for rehearing was granted on March 19, 2007. (App., *infra*, 1a-2a) However, the petition for rehearing en banc was denied. *Id.* The court of appeals' judgment on rehearing was entered March 19, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment provides, in relevant part: "Congress shall make no law . . . abridging the freedom of speech. . . ."

Title 42 U.S.C. § 1983 provides, in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State

> or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

STATEMENT

Respondents allege violation of their First Amendment right to free speech and seek redress pursuant to 42 U.S.C. §1983.

I. Factual Background

Plaintiffs, Roger Fairley and Richard Gackowski, were formerly employed as correctional officers at the Cook County Department of Corrections. (R. 447-1) Petitioners Evan Fermaint and Noberto Bercasio were, at all times material to this suit, correctional officers at the CCDOC. Petitioner Fred Coffey was a correctional officer at the CCDOC from August 7, 1995 to November 15, 2002. (R. 455-1)

During their respective periods of employment with the CCDOC Fairley and Gackowski were equal in rank to Fermaint, Bercasio, and Coffey. Fairley, Gackowski, Fermaint, and Bercasio were all assigned to the same shift in Division I of the jail from approximately 1998 to July 2002. Coffey was assigned outside of Division I during the year 2001.

The CCDOC General Orders require correctional officers to report misconduct by other officers. Both Fairley and

Gackowski were trained to report misconduct by other officers in accordance with the General Orders.

Fairley and Gackowski both claim to have been harassed by Fermaint, Bercasio, and Coffey while on duty at the CCDOC. (R. 257-1) They both ascribe the motive for the harassment as their having been witness to officer-on-inmate violence. Fairley and Gackowski point to three alleged specific instances:

a. Fairley claims that in "late 1998 or early 1999" he saw Coffey "forearm" an inmate's head into a steel plate wall. Afterwards, Fairley alleges that Coffey called him a "snitch" and threatened to "beat him up."

b. Gackowski claims to have witnessed Coffey "beating" a different inmate in April of 2000. According to Gackowski, he yelled at Coffey during the beating and told Coffey not to include him as a witness in his report. Gackowski claimed that Coffey subsequently told him that he was not "part of the team." After April 2000, Gackowski testified that Fermaint started calling him a "snitch." Gackowski further testified that, subsequent to April 2000, Coffey, Fermaint, and Bercasio each started calling Gackowski a "social worker."

c. Last, Fairley claims he witnessed Fermaint and Bercasio "beating" various inmates during an altercation on July 29, 2000 in SI-2.[1] Fairley told

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[1] "SI-2" is an abbreviation for "Special Incarceration Unit 2," and is a section of the Cook County Jail complex housed within

> Gackowski and other correctional officers about the July 29, 2000 beating he claimed to have witnessed. Gackowski did not witness any of the events on July 29, 2000 in SI-2 because he was assigned that day to a different division of the jail complex. Gackowski did not see any officers use excessive force, act inappropriately, or engage in any misconduct on July 29, 2000.

Fairley and Gackowski place the most stock in the last of these incidents. After the SI-2 Incident, various inmates filed a lawsuit in state court known as the "Fields Litigation," which named Fermaint and Bercasio, among others, as defendants. Gackowski testified that he told correctional officer Rodriguez that he was "going to tell the truth" about the SI-2 Incident. Similarly, Fairley told a number of correctional officers that he was "not going to lie" about the SI-2 Incident. Neither Gackowski nor Fairley told Fermaint, Bercasio, or Coffey that he was going to tell the truth concerning the SI-2 Incident. (R. 455)

Fairley testified that Fermaint harassed him by refusing to provide enough lunches and other supplies for the SI-2 inmates, which caused the inmates to become irate and yell at Fairley. Fairley also testified that Fermaint and Bercasio would physically grab him by the waist and imitate intercourse and otherwise harass him by failing to unlock the security door to the SI-2 Unit to allow Fairley to use the restroom and calling him an "inmate lover." Gackowski also testified that from late 2000 through May or June 2002,

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Division I where high profile detainees are housed. The July 29, 2000 altercation has been referred to throughout this litigation as the "SI-2 Incident."

Bercasio and Fermaint physically grabbed him by the waist and imitated intercourse. Bercasio also drew cartoons of Gackowski.

In June of 2002, Gackowski told Internal Affairs that he was being harassed. And on July 9, 2002, Gackowski submitted a written complaint to Internal Affairs (IAD) alleging that he had been the subject of harassment by his fellow correctional officers, including Fermaint, Bercasio, and approximately a dozen others. The July 9, 2002 complaint made no reference to the SI-2 Incident or any other incident of alleged inmate abuse.

Gackowski was interviewed by Internal Affairs as a result of his complaint. During the course of his interview, Gackowski identified officers who had harassed him – among them Fermaint and Bercasio – and described the harassment as including physical grabbing, sexually suggestive cartoons, and degrading and sexual comments about his wife. Gackowski told the interviewer that he believed he had been singled out for harassment because he did not "smack inmates around for no reason."

On July 23, 2002, Gackowski was transferred to Division VIII, a different division of the jail complex. On July 24, 2002, Gackowski filed a charge of discrimination with the U.S. Equal Employment Opportunity Commission alleging he had been discriminated against "because of my sex, male . . . ."

While in Division VIII from July 23, 2002 to November 9, 2002, Gackowski did not experience any form of harassment. On October 10, 2002, Gackowski "bid" pursuant to collective bargaining rules to be transferred back to Division I. On November 10, 2002, pursuant to his

request, Gackowski was moved back to Division I. From November 10, 2002 to January 8, 2003, Gackowski did not report any claims of harassment to IAD.

On January 9, 2003, Gackowski submitted a written complaint to IAD. On January 10, 2003, Gackowski was offered a transfer to anywhere on the jail compound. Gackowski declined the transfer offer and informed IAD investigators that he was leaving the CCDOC.

Coffey left the CCDOC in November 2002. (R. 447-1) Neither Fairley nor Gackowski have had any contact with Coffey since he left the CCDOC. (R. 448) Fermaint bid out of Division I in November 2002. (R. 447-1)

Fairley was involved in an altercation with an inmate on December 20, 2002, (R. 447-1) He theorizes that one or more of the defendants to the suit provoked the inmate to attack him. (R. 553-1) The States Attorney's Office never brought criminal charges against the inmate for his assault on Fairley. (R. 447-1)

Fairley last worked a shift at the CCDOC in January 2003. (R. 553-1) Gackowski worked his last shift in January 2003. (*Id.*) Both Fairley and Gackowski then used all of their vacation and sick days and tendered their resignations after that time was exhausted on February 3, 2003. (*Id.*)

From the time he started to the day he left, Fairley never submitted a written complaint to IAD claiming that he was the subject of harassment. (R. 447-1) Nor did he ever submit a written complaint concerning inmate abuse. (*Id.*)

Fairley sat for a deposition in the *Fields* case on three occasions, the first occasion being after his last day on the job

at the CCDOC. (R. 553-1) Gackowski sat for the first session of his deposition in the *Fields* case after his resignation from the CCDOC. (R. 448) No one at the CCDOC did anything to prevent either Fairley or Gackowski from testifying on their appointed days. (R. 447-1)

The two appeared at a press conference in February 2003 after tendering their resignations.

On July 25, 2003, Fairley and Gackowski filed the underlying lawsuit. (R. 1)

The *Fields* case was tried in May and June of 2005. (R. 240) Both Fairley and Gackowski testified for the plaintiffs. (R. 462-1, R. 465-1) A jury returned a verdict in favor of all of the defendant correctional officers, including Fermaint and Bercasio, after deliberating for less than one hour. (R. 420)

II. Proceedings Below

Respondents filed a five count Complaint on July 25, 2003 naming thirteen individual defendants as well as Cook County. On October 16, 2003, petitioners moved to dismiss respondents' complaint pursuant to Federal Rule of Civil Procedure 12(b)(6). One of the arguments raised in the Motion to Dismiss was based on qualified immunity. The District Court denied the motion. *See Fairley v. Andrews*, 600 F.Supp. 660 (N.D.Ill. 2004). Petitioners then submitted to an exhaustive discovery process.

Near the conclusion of discovery, all defendants excepting Cook County filed Motions for Summary Judgment. Respondents voluntarily dismissed a count alleging state law claims of intentional infliction of emotional distress in the face of the Motion for Summary Judgment. One of the defendants,

Correctional Officer Gabriel Ochoa – who was named only in the intentional infliction of emotional distress count – was voluntarily dismissed on respondents' motion.

On May 4, 2006, the District Court entered a Memorandum Opinion and Order (App., *infra*, 28a-65a) denying the motion on legal grounds, specifically declining to "revisit" the District Court's earlier ruling relative to qualified immunity. *See Fairley v. Andrews*, 430 F.Supp.2d 786, 797 (N.D.Ill. 2004).

Petitioners filed a notice of appeal on May 18, 2006, seeking appellate review of the District Court's denial of their Motion on qualified immunity grounds.

The sole surviving count of respondents' Second Amended Complaint complains of "harassment," ascribing the motivation for the "harassment" to "retaliation deliberately aimed at silencing the Plaintiffs and thwarting their attempts to report and testify on matters of the State's interest and of public concern." (R. 257-1)

Specifically, the Complaint alleges that Fairley and Gackowski "made known to their fellow officers that they would tell the truth if asked about what they had seen or heard" regarding a July 29, 2000 altercation between officers and inmates known as "the SI-2 Incident" that resulted in a lawsuit. And that "[t]hereafter the Defendants engaged in a series of deliberate actions to discourage Plaintiffs Fairley and Gackowski from attending depositions and from testifying or talking freely, fully and truthfully about the SI-2 Incident."

On December 20, 2006, the Seventh Circuit dismissed the appeal for want of jurisdiction. *Fairley v. Fermaint*, 471 F.3d 826, 829 (7th Cir. 2006). On March 19, 2007, the court

granted petitioners' request for panel rehearing and issued a second decision. *Fairley v. Fermaint*, 482 F.3d 897 (7th Cir. 2007). Quoting *Toeller v. Wisconsin Department of Corrections*, 461 F.3d 871, 873-74 (7th Cir. 2006), the court concluded that it did have jurisdiction to address the merits of the appeal. *Id.* at 901. However, the court ultimately affirmed the District Court's decision, stating that issues regarding whether petitioners engaged in the conduct of which respondents accused them, and whether they did it to retaliate for respondents' constitutionally protected speech, were questions that should be resolved at trial. *Id.* at 904.

While acknowledging that the allegations concerning retaliation for the alleged work-related speech were barred by this court's holding in *Garcetti v. Ceballos*, 126 S.Ct. 1951 (2006), the panel held that the suit could proceed to trial in order to determine if the retaliation arose from "testimony that plaintiffs gave in inmates' suits." The panel declined to review the record in order to resolve the question, citing *Johnson v. Jones*, 515 U.S. 304, 115 S.Ct. 2151, 132 L.Ed.2d 238 (1995), for the proposition that such review was "not allowed":

> Piecing out the state of the record, and drawing inferences from the evidence, is not allowed on an interlocutory appeal based on a claim of immunity.

Fairley v. Fermaint 482 F.3d at 902. The court went on to hold that the arguments raised on interlocutory appeal could be made on appeal from the final judgment. *Id.* at 904. (Citation omitted).

REASONS FOR GRANTING THE PETITION

I. *Johnson v. Jones*, 515 U.S. 304, 115 S. Ct. 2151, 132 L.Ed.2d 238 (1995), Does Not Stand for the Proposition that an Appellate Court Is Precluded from Reviewing the Record on an Interlocutory Appeal in a Qualified Immunity Case and the Seventh Circuit's Decision to Ignore the Record Is in Conflict with *Behrens* v. Pelletier, 516 U.S. 299, 312, 116 S.Ct. 834, 133 L.Ed.2d 773 (1996)

In *Johnson v. Jones*, 515 U.S. 304, 311-12, 115 S.Ct. 2151, 132 L.Ed.2d 238 (1995), this Court found that a district court's denial of a qualified immunity was an appealable final decision to the extent it turned on an issue of law. The term following, in *Behrens* v. Pelletier, 516 U.S. 299, 312, 116 S.Ct. 834, 133 L.Ed.2d 773 (1996), this Court clarified its holding in *Johnson* – expressly rejecting the argument that the existence of an issue of fact foreclosed interlocutory appeal:

> [R]espondent asserts that appeal of denial of the summary-judgment motion is not available because the denial rested on the ground that "[m]aterial issues of fact remain." This, he contends, renders the denial unappealable under last Term's decision in *Johnson v. Jones,* 515 U.S., at 313-318, 115 S.Ct., at 2156-2158. That is a misreading of the case. Denial of summary judgment often includes a determination that there are controverted issues of material fact, see *313 Fed. Rule Civ. Proc. 56, and *Johnson* surely does not mean that *every* such denial of summary judgment is nonappealable. Johnson held, simply, that determinations of evidentiary sufficiency at summary judgment are not immediately appealable merely because they happen to arise in a qualified-immunity

> case; if what is at issue in the sufficiency determination is nothing more than whether the evidence could support a finding that particular conduct occurred, the question decided is not truly "separable" from the plaintiff's claim, and hence there is no "final decision" under Cohen and Mitchell. See 515 U.S., at 313-318, 115 S.Ct., at 2156-2158. Johnson reaffirmed that summary judgment determinations are appealable when they resolve a dispute concerning an "abstract issu[e] of law" relating to qualified immunity, id., at 317, 115 S.Ct., at 2158-typically, the issue whether the federal right allegedly infringed was "clearly established," see, e.g., Mitchell, supra, at 530-535, 105 S.Ct., at 2817-2820; Davis v. Scherer, 468 U.S. 183, 190-193, 104 S.Ct. 3012, 3017-3019, 82 L.Ed.2d 139 (1984).

In holding that a review of the record on appeal is "not allowed," the Seventh Circuit has interpreted *Johnson* in such a way as to create an impossible standard that movants for summary judgment in qualified immunity cases must meet on interlocutory appeal: that to the extent an analysis of qualified immunity turns on *any* fact (regardless of whether the district court found there to be an genuine issue with regard to that fact), the issue is not subject to review because the record cannot be reviewed on appeal. *See Sallenger v. Oakes*, 473 F.3d 731 (7th *Cir. 2007*) (defendant appealing denial of motion for summary judgment in qualified immunity case must accept district court's finding of facts in order for Seventh Circuit to have jurisdiction to hear appeal); *Via v. LaGrand*, 469 F.3d 618 (7th Cir. 2006)(discussing *Johnson* and *McKinney*); and *McKinney v. Duplain*, 463 F.3d 679 (7th Cir. 2006) (court concluded that it could not review the record to determine whether it supported the district court's

conclusion that a genuine issue of fact existed as to whether the suspect charged a police officer before he was fired upon).

The Seventh Circuit's approach cannot be harmonized with its earlier decisions expressly discouraging appeals of adverse decisions on Rule 12(b)(6) motions based in qualified immunity. *See Jacobs v. City of Chicago*, 215 F.3d 758, 775 (7th Cir. 2000) ("Rule 12(b)(6) is a mismatch for immunity and almost always a bad ground of dismissal. . . summary judgment is the right way to handle claims of immunity." *Easterbrook, J., concurring.*); *See also Alvarado v. Litscher*, 267 F.3d 648, 651 (7th Cir. 2001).

Neither can the Seventh Circuit's approach be squared with the practice of this Court. In *Scott v. Harris*, ___ U.S. ___, 127 S.Ct. 1769, ___ L.Ed.2d ___ (2007), decided this term, the Court conducted an extensive review of a videotape included in the record in considering whether, consistent with the Fourth Amendment, an officer could take actions placing a "fleeing motorist at risk of serious injury or death in order to stop the motorist's flight from endangering the lives of innocent bystanders." *Scott*, 127 S.Ct. at 1772.

> [T]he Court of Appeals adopted respondent's assertions that, during the chase, "there was little, if any, actual threat to pedestrians or other motorists, as the roads were mostly empty and [respondent] remained in control of his vehicle." 433 F.3d, at 815. . . .
>
> The videotape tells quite a different story. There we see respondent's vehicle racing down narrow, two-lane roads in the dead of night at speeds that are shockingly fast. We see it swerve around more than a dozen other cars, cross the double-yellow line, and

force cars traveling in both directions to their respective shoulders to avoid being hit. We see it run multiple red lights and travel for considerable periods of time in the occasional center left-turn-only lane, chased by numerous police cars forced to engage in the same hazardous maneuvers just to keep up. Far from being the cautious and controlled driver the lower court depicts, what we see on the video more closely resembles a Hollywood-style car chase of the most frightening sort, placing police officers and innocent bystanders alike at great risk of serious injury.

At the summary judgment stage, facts must be viewed in the light most favorable to the nonmoving party only if there is a "genuine" dispute as to those facts. Fed. Rule Civ. Proc. 56(c). As we have emphasized, "[w]hen the moving party has carried its burden under Rule 56(c), its opponent must do more than simply show that there is some metaphysical doubt as to the material facts .... Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial.' " *Matsushita Elec. Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986) (footnote omitted). "[T]he mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). When opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not

> adopt that version of the facts for purposes of ruling on a motion for summary judgment.
>
> That was the case here with regard to the factual issue whether respondent was driving in such fashion as to endanger human life. Respondent's version of events is so utterly discredited by the record that no reasonable jury could have believed him. The Court of Appeals should not have relied on such visible fiction; it should have viewed the facts in the light depicted by the videotape.

Id. at 1775-76 (footnotes omitted).

Here, while the Seventh Circuit held the suit could proceed to trial in order to determine if the alleged retaliation arose from "testimony that plaintiffs gave in inmates' suits," the panel declined to review the record in order to resolve the question. In point of fact, there is *no* evidence in the record – competent or otherwise – to suggest that petitioners were in any way aware of respondents' "assistance to prisoners and their lawyers in litigation." Moreover, there is no evidence in the record to suggest either of the respondents *did anything* to assist any inmates' attorneys at any point that pre-dates any of the allegations of "harassment."

II. It has not been "Clearly Established" in the Seventh Circuit, or any other Circuit, that it is Legally Possible for One, Co-Equal, Employee to "Deprive" Another, Co-Equal, Employee of His or Her Constitutional Rights and Defendants are, therefore, Entitled to Qualified Immunity.

Section 1983 permits a cause of action for the deprivation of a right secured by the Constitution by someone acting

under color of state law. There are, broadly speaking, two elements to any such claim: (1) the deprivation of a right secured by the Constitution; and (2) that the deprivation occurred "under color of state law." See *Alvarado v. Litscher*, 267 F.3d 648, 651 (7th Cir. 2001) (quoting *Gomez v. Toledo*, 446 U.S. 635, 640, 100 S.Ct. 1920, 64 L.Ed.2d 572 (1980)). As a matter of law, neither element can be established as against petitioners, respondents' former co-workers.

A. A Conflict Exists Among the Circuits Involving Public Employment First Amendment Retaliation Cases.

The U.S. Supreme Court "has established a mandatory order of priority for resolution of the two standard issues" relative to resolving the question of qualified immunity. *Bunting v. Mellen*, 541 U.S. 1019, 124 S.Ct. 1750, 1753 (2004) (Scalia, J., dissenting) (citing *Saucier v. Katz*, 533 U.S. 194, 201, 121 S.Ct. 215, 150 L.Ed.2d 272 (2001)). "A court must ask, first, whether the facts alleged show the officer's conduct violated a constitutional right; if so, the next, sequential step is to resolve the qualified-immunity claim by asking whether the right was clearly established." Id. (quoting, in part, *Saucier v. Katz*, supra.)(internal quotation marks omitted) "The requisites of a qualified immunity defense *must* be considered in proper sequence." *Id.* (quoting *Saucier v. Katz*, supra, at 200, 121 S.Ct. 2151) (emphasis added).

Under the second step of the qualified immunity analysis required by *Saucier v. Katz*, 533 U.S. 194, 201, 121 S.Ct. 215, 150 L.Ed.2d 272 (2001), a government official is shielded from liability for damages when his or her conduct does not violate "clearly established" statutory or

constitutional rights of which a reasonable person would have known. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

A proper qualified immunity analysis requires that the constitutional right "be identified in a particularized sense with respect to the circumstances of the alleged violation." *Burns v. Reed*, 44 F.3d 524 (7th Cir.1995). In order to demonstrate that the right was "clearly established" the plaintiff must offer "a closely analogous case or evidence that the defendants' conduct is so patently violative of the constitutional right that reasonable officials would know without guidance from the courts." Id. [citing *Casteel v. Pieschek*, 3 F.3d 1050, 1053 (7th Cir.1993).]

Pickering v. Board of Education, 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968) established that a public employer cannot terminate one of its employees in retaliation for an exercise of that employee's First Amendment rights on a matter of public concern. Since *Pickering*, a large body of case law has developed expanding and expounding upon each of the rule's component parts – foremost among them: Does the rule apply to an employer's actions short of termination?

Over the past twenty-seven years, First Amendment retaliation cases in the Seventh Circuit can be categorized in one of three ways:

(1) those cases holding that an "adverse employment action" is an element of plaintiff's proof; *See e.g. DeGuiseppe v. Village of Bellwood*, F.3d 187, 192 (7th Cir. 1995)

(2) those cases which that make actionable even "trivial annoyances" provided they rise to the level of an "effective deterrent to the exercise of First Amendment rights." *See*

e.g. Bart v. Telford, 677 F.2d 622 (7th Cir.1982); *Pieczynski v. Duffy*, 875 F.2d 1331 (7th Cir.1989); and

(3) cases seeking to harmonize the approaches of categories (1) and (2). *See e.g. Powers v. Summers*, 226 F.3d 815, 820 (7th Cir. 2000); *Mosely v. Board of Educ. of City of Chicago*, 434 F.3d 527 (7th Cir. 2006).

No case in *any* of the lines has, however, held that one employee could be liable on Constitutional grounds for harassing another, co-equal, employee. And this must be true for at least two closely-related reasons, both of which are cemented in the basic principle that only the government can deprive a citizen of rights conferred by the Constitution: First, co-employees cannot usually interact with one another in such a way that one employee is acting – relative to another, co-equal employee – as the alter ego of the government employer. And second, co-employees do not act "under color of state law" when interacting with one another.

The decision in the underlying case extends the 7th Circuit's public employment First Amendment retaliation jurisprudence further than that of any other Circuit – effectively permitting *any* public employee to be potentially liable for *anything* "likely to deter" another public employee's "exercise of free speech."

And the holding serves to further highlight a split in authority among the Circuits where public employment First Amendment retaliation cases are involved. *See* Bohn, Elizabeth J., *Put On Your Coat, A Chill Wind Blows: Embracing the Expansion of the Adverse Employment Action Factor In Tenth Circuit First Amendment Retaliation Claims*, 83 Denv. U. L. Rev. 867 (2006); Rosalie Berger Levinson, *Superimposing Title VII's Adverse Action Requirement on*

First Amendment Retaliation Claims: A Chilling Prospect for Government Employee Speech, 79 TUL. L. REV. 669, 694 (2005).

Four Circuits – the First, Fifth, Eighth and Eleventh – explicitly limit public employment First Amendment retaliation cases to those involving some type of a "materially adverse change" in the terms or conditions of employment. See e.g. *Acosta-Orozco v. Rodriquez-de-Rivera*, 132 F.3d 97, 101 n. 5 (1st Cir. 1997) ["unreasonably inferior" test]; *Banks v. East Baton Rouge Parish School Board*, 320 F.3d 570, 580 (5th Cir. 2003) ["adverse employment action"]; *Meyers v. Starke*, 420 F.3d 738, 744 (8th Cir. 2005) ["adverse employment action"]; *Stavropoulos v. Firestone*, 361 F.3d 610, 619 (11th Cir. 2004) [action affecting "important condition of employment"].

Unlike those four Circuits, Seventh Circuit jurisprudence is unmoored to any consistent standard. See e.g. *Bart v. Telford*, 677 F.2d 622 (7th Cir.1982); ["campaign of petty harassments" may be actionable under Section 1983]; *Pieczynski v. Duffy*, 875 F.2d 1331 (7th Cir.1989) ["Harassment of a public employee for his political beliefs violates the First Amendment unless the harassment is so trivial that a person of ordinary firmness would not be deterred from holding or expressing those beliefs"] *DeGuiseppe v. Village of Bellwood*, 68 F.3d 187, 192 (7th Cir. 1995) [holding that an "adverse employment action" is an element of plaintiff's proof in the context of a First Amendment retaliation claim]; *Powers v. Summers*, 226 F.3d 815, 820 (7th Cir. 2000) [defining "adverse employment action" in terms of the *Bart v. Telford/Peicynski v. Duffy* test]; *Mosely v. Board of Educ. of City of Chicago*, 434 F.3d 527 (7th Cir. 2006) [same].

The limitation imposed by an express requirement that the plaintiff demonstrate a "materially adverse change" in the terms or conditions of employment has two effects beneficial to the administration of these types of claims: (1) it necessarily limits the pool of defendants to those who can affect conditions of employment (i.e. supervisory personnel); and (2) it imposes some limitation on the scope of the cause of action beyond that currently imposed in the Seventh Circuit – the outer contours of which are delineated only be the legal maxim *de minimis non curat lex*. See *Bart v. Telford*, 677 F.2d 622, 625 (7th Cir.1982).

It is axiomatic that only the government can deprive a citizen of rights conferred by the Constitution. And one public employee without the authority to affect the terms and conditions of another public employee's employment cannot be said to "violate" the second public employee's First Amendment rights no matter whatever he or she does. Hundreds of thousands of public employees reside within the confines of the Seventh Circuit. And the holding in *Fairley,* in combination with the Seventh Circuit's standard-less First Amendment retaliation jurisprudence, has the potential to inundate the federal courts with, quite literally, thousands upon thousands of employee-versus-employee claims.

B. The Seventh Circuit Has Yet to Conclusively Resolve Whether The "Adverse Employment Action" Standard or The "Reasonably Likely To Deter" Standard is the Appropriate Standard to Apply to a Public Employer's Actions For Purposes of a First Amendment Retaliation Claim.

The "adverse employment action" element found in *DeGuiseppe v. Village of Bellwood*, 68 F.3d 187, 192 (7th Cir. 1995) and others would seem to have its roots in *McGill*

v. Board of Education, 602 F.2d 774 (7th Cir.1979), a case in which the Seventh Circuit extended *Pickering's* holding - that a public employee could not be terminated for exercising his First Amendment rights - beyond termination to a "retaliatory transfer. *McGill* held that the standard to be applied to such cases was "whether protected speech" was the motivating factor "for the *adverse action* . . ." *McGill* 602 F.2d at 779 (emphasis added). The unstated logic underlying the requirement would seem to lie in further extending, by analogy, *Pickering's* termination requirement to "adverse action[s]" affecting public employment.

Another way of explaining the "adverse employment action" construct is as a means of establishing a government employer's vicarious liability for the wrongful retaliatory actions - specifically by way of the "aided in the agency relation" rule found in Section 219(2)(d) of the Restatement (Second) of Agency. This "aided in the agency relation" framework was settled upon by the Court in *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 118 S.Ct. 2257 (1998), as a means of explaining the closely analogous "tangible employment action" in a Title VII context:

> When a party seeks to impose vicarious liability based on an agent's misuse of delegated authority, the Restatement's aided in the agency relation rule . . . appears to be the appropriate form of analysis.
>
> . . . In a sense, most workplace tortfeasors are aided in accomplishing their tortuous objective by the existence of the agency relation: Proximity and regular contact may afford a captive pool of potential victims. Were this to satisfy the aided in the agency relation standard, an employer would be subject to vicarious liability not only for all supervisor

> harassment, but also for all co-worker harassment, a result enforced by neither the EEOC nor any court of appeals to have considered the issue. The aided in the agency relation standard, therefore, requires the existence of something more than the employment relation itself.
>
> At the outset, we can identify a class of cases where, beyond question, more than the mere existence of the employment relation aids in commission of the harassment: where a supervisor takes a tangible employment action against the subordinate. Every Federal Court of Appeals to have considered the question has found vicarious liability when a discriminatory act results in a tangible employment action. Although few courts have elaborated how agency principles support this rule, we think it reflects a correct application of the aided in the agency relation standard.

Burlington Industries, Inc. v. Ellerth, 524 U.S. 742, 760, 118 S.Ct. 2257, 141 L.Ed.2d 633 (1998).

As the *Ellerth* Court made clear, only supervisors are in position to take the types of actions that would bind the employer under the Restatement analysis:

> When a supervisor makes a tangible employment decision, there is assurance the injury could not have been inflicted absent the agency relation. . . . *As a general proposition, only a supervisor, or other person acting with the authority of the [employer], can cause this sort of injury.* A co-worker can break a co-worker's arm as easily as a supervisor, and anyone who has regular contact with an employee can inflict

> psychological injuries by his or her offensive conduct. But one co-worker (absent some elaborate scheme) cannot dock another's pay, nor can one co-worker demote another. *Tangible employment actions fall within the special province of the supervisor.*

Burlington Industries, Inc. v. Ellerth, 524 U.S. at 761-62 (emphasis added).

Practically, the situation has been no different in the Seventh Circuit even in the second category of cases that do not reference "adverse employment actions." So in *Bart v. Telford*, 677 F.2d 622 (7th Cir.1982), it was of undoubted legal significance (though unanalyzed in the opinion) that the allegation at issue was that it was the Mayor of Springfield who "orchestrated a campaign of petty harassments" against the plaintiff, a subordinate employee who had endorsed an opposition candidate to succeed the current officeholder (after dropping out of the race herself). And in *Pieczynski v. Duffy*, 875 F.2d 1331 (7th Cir.1989), it was Pieczynski's superiors, retaliating against her because of her 10th Ward political background, who removed her long distance line and denied her vacation requests (among other things).

Application of the proper test has been confused further still by this Court's decision in *Garcetti v. Ceballos, supra,* - which speaks of an "adverse employment action" as an element of a §1983 retaliation claim - coupled with this Court's decision to adopt - three weeks later - the competing "reasonably likely to deter" standard as the appropriate test for *Title VII* retaliation claims. *Burlington Northern and Santa Fe Ry. Co. v. White*, __ U.S. __, 126 S.Ct. 2405, 165 L.Ed.2d 345 (2006).

Qualified immunity dictates that government employees "not become prey to every hypothesis of what the law might have come to forbid had it eventually developed along certain lines." *Dahm v. Flynn*, 60 F.3d 253, 261(7th Cir. 1994) (Easterbrook, J. dissenting). All this flux means that the Seventh Circuit, or another, will eventually hold that fellow employees are potentially liable to one another on Constitutional grounds is indiscernible at this point. This case presents a significant opportunity for this Court to resolve the instability in the law surrounding this issue.

C. A State Employee Cannot be Said to be "Acting Under Color Of State Law" When Interacting With Other Co-Equal State Employees Unless He or She is Explicitly Acting Pursuant to Powers Conferred by the State.

"[T]he constitutional guarantee of free speech is a guarantee only against abridgment by government, federal or state." *Hudgens v. NLRB*, 424 U.S. 507, 96 S.Ct. 1029, 47 L.Ed.2d 196 (1976). A private actor acting on his or her own cannot deprive a citizen of First Amendment rights. *See Lansing v. City of Memphis*, 202 F.3d 821, 828 (6th Cir. 2000).

The Seventh Circuit's decision in *Fairley* effectively ignores the distinction between private action and action under color of state law. A result which is in conflict with decisions of at least two other Circuits.

The Fourth Circuit distinguished private harassment between fellow government employees in *Hughes v. Halifax County School Bd.*, 855 F.2d 183 (4th Cir.1988), cert. denied, 488 U.S. 1042, 109 S.Ct. 867, 102 L.Ed.2d 991 (1989), a case involving county workers who staged a mock

hanging of plaintiff in alleged retaliation for plaintiff's participation in a grand jury inquiry of the school board. There, plaintiff argued that "he was assaulted, battered, and subjected to intentional emotional distress under color of state law because he was accosted by county employees with retaliation in their eyes, on county land, with a county-owned rope, during work hours." The court concluded that harassment by fellow school district employees was not "under color of law" because defendants did not purport to act under authority vested in them by the state. The Fourth Circuit cautioned against a broad reading of "state action" where "any employee of any state who commits a tort has potentially violated §1983 ... [w]e cannot endorse this result." 855 F.2d at 186.

The First Circuit arrived at the same conclusion in *Martinez v. Colon*, 54 F.3d 980, 986 (1st Cir. 1995). In *Martinez*, a police officer sued various of his fellow officers after another fellow officer accidentally discharged his firearm, maiming him. Entering summary judgment on the constitutional claims, the First Circuit held that the plaintiff had not produced any evidence tending to show that the plaintiff's tormentor, when brandishing the firearm, was exercising or purporting to exercise police power:

> Here, the record is transpicuously clear that throughout the course of Martinez' ordeal Valentin did not exercise, or purport to exercise, any power (real or pretended) possessed by virtue of state law. To the contrary, Valentin was bent on a singularly personal frolic: tormenting an acquaintance. Though on duty and in uniform, Valentin's status as a police officer simply did not enter into his benighted harassment of his fellow officer. Hazing of this sort, though

> reprehensible, is not action under color or pretense of law.
>
> . . .
>
> [Had the plaintiff] been a civilian rather than a fellow officer, the significance of [defendant officer's] uniform and weapon for purposes of the color-of-law determination might well have been greater. But when the victim is himself a fellow officer and the particular interaction between the two officers is of a distinctively personal nature, it can generally be assumed that the aggressor's official trappings, without more, will not lead the victim to believe that the aggressor in acting with the imprimatur of the state and, in turn, to forgo exercising legal rights.

Martinez, 54 F.3d at 987-88 n. 6:

"[W]hether a police officer is acting under color of state law turns on the nature and circumstances of the officer's conduct and the relationship of that conduct to the performance of his official duties." *Martinez v. Colon*, 54 F.3d 980, 986 (1st Cir. 1995). "The key determinant is whether the actor, at the time in question, purposes to act in an official capacity or to exercise official responsibilities pursuant to state law." *Id.* Acting "under 'color' of law means under 'pretense' of law." *Screws v. U.S.*, 325 U.S. 91, 111, 65 S.Ct. 1031, 1040 (1945). And "acts of officers in the ambit of their personal pursuits are plainly excluded." *Screws*, 325 U.S. at 111, 65 S.Ct. at 1040.

The harassment at issue is wholly unrelated to the performance of the defendant officers' duties as state employees. The Petitioners would have been just as capable of the sexually-related "harassment;" drawing cartoons of

Gackowski or calling Fairley names if they were all employees at a local McDonalds. The complained of interactions arise merely from proximity – not any type of state-conferred powers. By their very nature, they are "private acts" rather than acts taken "under color of state law." Consequently, it cannot be said to have been "clearly established" that petitioners, co-equal employees, were potentially subject to suit under §1983.

CONCLUSION

For all the reasons set forth herein, the Petitioners respectfully request that the petition for a writ of certiorari be granted.

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June 18, 2007

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 06-2411

[Filed March 19, 2007]

ROGER FAIRLEY and RICHARD GACKOWSKI, Plaintiffs-Appellees,	)
v.	)
EVAN FERMAINT, NORBERTO BERCASIO, and FRED COFFEY, Defendants-Appellants.	)

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 03 C 5207.
Amy J. St. Eve, Judge.

Before Hon. FRANK H. EASTERBROOK, Chief Judge, Hon. RICHARD A. POSNER, Circuit Judge, Hon. DIANE P. WOOD, Circuit Judge.

ORDER

Defendants-appellants filed a petition for rehearing and rehearing en banc on January 3, 2007. All of the judges on the panel have voted to grant rehearing and an opinion is issued contemporaneously with this order. However, the petition for rehearing en banc* is DENIED.

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* Judge Flaum did not participate in the consideration of this matter.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 06-2411

[Filed March 19, 2007]

ROGER FAIRLEY and RICHARD GACKOWSKI,
Plaintiffs-Appellees,

v.

EVAN FERMAINT, NOBERTO BERCASIO, and FRED COFFEY,
Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 03 C 5207—**Amy J. St. Eve**, *Judge*.

ARGUED NOVEMBER 7, 2006—
DECIDED DECEMBER 20, 2006
ON REHEARING DECIDED MARCH 19, 2007

Before EASTERBROOK, *Chief Judge*, and POSNER and WOOD, *Circuit Judges*.

EASTERBROOK, *Chief Judge*. Two former guards at Cook County Jail contend in this suit under 42 U.S.C. §1983 that some of their ex-colleagues violated the Constitution's first amendment (applied to state actors via the fourteenth) by vilifying and assaulting them because they stood up for inmates' rights. According to the complaint, the defendants and their confederates bully and ostracize any guard who plays by the rules; these strong arm tactics organize and protect guards who beat inmates at whim and then lie about their activities to their superiors, criminal investigators, and judges in any suits that the prisoners may file. Plaintiffs' allegations may or may not be true; this litigation has not reached the point at which a judge or jury sifts fact from fiction.

Defendants moved for summary judgment on the ground of official immunity, and they have appealed from the order denying this motion. Despite its interlocutory character, such an order is appealable. But there is a wrinkle: defendants asked the court to dismiss the complaint two years ago, before discovery commenced, and did not appeal from the adverse decision. They reply that *Behrens v. Pelletier*, 516 U.S. 299 (1996), allows successive interlocutory appeals at the complaint and summary judgment stages, so it must logically allow defendants to forego appeal at the complaint stage and save their arguments for summary judgment.

Our initial decision in this case, 471 F.3d 826 (2006), dismissed the appeal for want of jurisdiction. Relying on *Garvin v. Wheeler*, 304 F.3d 628, 632-33 (7th Cir. 2002), and the principle that the time for appeal cannot be extended by seeking reconsideration of a district court's order after the 30 days has lapsed, *see Charles v. Daley*, 799 F.2d 343, 347-48 (7th Cir. 1986), we concluded that the defendants' appeal was untimely. They could have appealed from the order

denying their motion to dismiss the complaint. When they failed to appeal from that decision, and then filed a motion for summary judgment reiterating arguments that the district court already had rejected, they were just attempting to extend the time for appeal, we held. Our opinion implied some doubt about the wisdom and scope of the decision in *Garvin* but observed that defendants had not asked us to revisit the subject, so we took circuit law as we found it.

Defendants' petition for rehearing, with the support of multiple *amici curiae*, has asked us to take a fresh look at the subject. The request is not one we can dispatch with the observation that it comes too late, for defendants' position turns out to have the support of language in *Toeller v. Wisconsin Department of Corrections*, 461 F.3d 871, 873-74 (7th Cir. 2006), a decision that none of the parties cited to us and that we did not consider independently. In dealing with an interlocutory appeal that had been taken to assert a form of sovereign immunity, *Toeller* had this to say:

> WDOC argues that this court has jurisdiction over the district court's order rejecting its defense, noting that it is established that "States . . . may take advantage of the collateral order doctrine to appeal a district court order denying a claim of Eleventh Amendment immunity." *Nanda v. Bd. of Trs. of Univ. of Ill.*, 303 F.3d 817, 821 (7th Cir. 2002) (quoting *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 147 (1993)). Toeller acknowledges this rule, but he argues that WDOC failed to file its notice of appeal within the time permitted by Fed. R. App. P. 4(a)—a step that is also required before this court may entertain the appeal.

> Toeller's position, however, rests on the mistaken premise that WDOC had one and only one opportunity to take an interlocutory appeal on this issue. He believes that this opportunity arose after the district court's initial denial of the State's motion to dismiss, which was docketed on December 23, 2003. But *Behrens v. Pelletier*, 516 U.S. 299 (1999), held to the contrary, in the closely-related area of interlocutory appeals from denials of motions to dismiss on qualified immunity grounds. *See id.* at 307. We see no reason why the rationale of *Behrens* should not apply with equal force to interlocutory appeals of Eleventh Amendment immunity claims. From that standpoint, WDOC's notice of appeal easily satisfied Rule 4(a). The district court denied WDOC's motion for summary judgment (which included its renewed Eleventh Amendment defense) on September 29, 2005, and the State filed its notice of appeal comfortably within the 30-day period allowed by the rule, on October 17, 2005. We conclude that we have jurisdiction over this appeal and thus may proceed to the merits.

This passage says that, when *Behrens* allows an appeal from both a decision denying a motion to dismiss a complaint and a decision denying a motion for summary judgment, the litigant's appeal from the latter decision cannot be rejected as an effort to extend the time to appeal from the former.

Just as our decision neglected *Toeller*, so the panel in *Toeller* did not mention *Garvin*. Perhaps it did not need to do so: unless the motions to dismiss and for summary judgment in *Toeller* were materially identical, then *Garvin* (as our panel understood it) did not foreclose appeal from the denial of summary judgment. A material difference between the

arguments made in the two stages is not, however, the ground on which *Toeller* resolved the appeal. The stated rationales of *Garvin*, *Toeller*, and the decision in this appeal are not compatible. We need to bring harmony to the law of the circuit, and to do so it is best to return to first principles. We grant the petition for rehearing and proceed to decide this appeal anew.

Mitchell v. Forsyth, 472 U.S. 511 (1985), held that a defendant who claims qualified immunity is entitled to take an interlocutory appeal. *Mitchell* used the approach of *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), which held that a decision is "final" (and thus appealable under 28 U.S.C. §1291) when it conclusively resolves an important question that cannot be reviewed on appeal at the litigation's end. The Court concluded in *Mitchell* that qualified immunity gives the defendant a right not only to prevail but also to avoid entanglement in the litigation—sometimes dubbed a "right not to be tried," this entitlement includes a right to avoid discovery if matters are sufficiently clear at the outset of the suit. *Behrens* held that *Mitchell* logically implies a right to appeal from either or both of an order refusing to dismiss the complaint and an order denying a public official's motion for summary judgment, because each of these orders can "conclusively resolve" an aspect of the qualified immunity right: an order refusing to dismiss the complaint conclusively rejects a defendant's claim of freedom from discovery, and an order denying a motion for summary judgment conclusively rejects a defendant's claim of freedom from trial. Each of these decisions is "final" in the *Cohen–Mitchell* framework, and §1291 allows the aggrieved party to appeal from every final decision.

Once a "final" decision has been made, the clock for filing a notice of appeal begins to run. It stops if a motion for

reconsideration is filed while time for appeal remains, *see United States v. Dieter*, 429 U.S. 6 (1976) (holding that this principle applies even if the order is interlocutory and no rule specifically authorizes a motion for reconsideration), and starts anew once such a motion is denied. Fed. R. App. P. 4(a)(4). A motion for reconsideration filed outside the time for appeal (or otherwise provided by rule for such a motion), or a successive motion for reconsideration, does not affect the time for appeal or reopen the window. *See Charles v. Daley*, *supra*. When there are two "final" decisions in a case, the time runs independently from each. This would be clear enough if the first "final" decision were an order denying a motion to dismiss the complaint, and the second were the final decision after a trial. It is no less true when (as a result of *Behrens*) multiple "final decisions" precede the single "final judgment." This is what *Toeller* said—correctly, we conclude.

Garvin could have been decided as a simple application of these principles. The district court denied a public official's motion for summary judgment. After the time for appeal had expired, defendant asked the district court to reconsider and appealed from the order denying that motion. Instead of applying the rule that an untimely motion for reconsideration never extends or reopens the time for appeal, however, the panel in *Garvin* stated that a motion making new legal or factual arguments might reopen the time—but that because no new arguments had been advanced in that case, the appeal must be dismissed. That analysis led us to ask whether the appellants in our case had made new arguments and, finding that they had not, to dismiss their appeal. But the search for new arguments is unsound. Once a final decision has been made, and the time for appeal (or an authorized motion to reconsider) has expired, it does not matter *what* arguments the litigant adduces. The window for appeal cannot be reopened.

The right inquiry under *Mitchell* and *Behrens* is what the court has done, not what arguments the litigant has made. Once the judge has conclusively denied a motion to dismiss the complaint or grant summary judgment, the time for appeal begins to run. A tentative decision, by contrast, is not "final" and does not start the time for appeal; the defendant is free to make new arguments (or reiterate old ones) without jeopardizing the opportunity to appeal once the district judge turns the tentative resolution into a conclusive one. To the extent that *Garvin* made appellate jurisdiction turn on the arguments presented *to* the judge, rather than the sort of decision made *by* the judge, it is disapproved.[†] We now hold, in accord with *Behrens* and *Toeller*, that a public official may appeal from an order conclusively denying a motion (based on qualified immunity) seeking summary judgment, whether or not the official has appealed from an order denying a motion to dismiss the complaint, and whether or not the motion for summary judgment rests on new legal or factual arguments. But once a conclusive resolution has been reached at either stage, a renewed motion for the same relief, or a belated request for reconsideration, does not reopen the time for appeal. Accord, *Robbins v. Wilkie*,433 F.3d 755, 762-63 (10th Cir. 2006); *Vega v. Miller*, 273 F.3d 460, 465-66 (2d Cir. 2001); *Grant v. Pittsburgh*, 98 F.3d 116, 120 (3d Cir. 1996).

This conclusion relieves public officials from any pressure to take what may be premature appeals from orders declining

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[†] This opinion has been circulated to all active judges under Circuit Rule 40(e). No judge requested a hearing en banc on the question whether to change the legal analysis employed in *Garvin*. Circuit Judge Flaum did not participate in the consideration or decision of this case.

to dismiss complaints. *See Jacobs v. Chicago*, 215 F.3d 758, 765 n.3 (7th Cir. 2000), *id.* at 775 (concurring opinion); *McMath v. Gary*, 976 F.2d 1026, 1031 (7th Cir. 1992). It also operates mechanically, a desirable feature in any jurisdictional rule. *See Budinich v. Becton Dickinson & Co.*, 486 U.S. 196, 202 (1988) ("The time of appealability, having jurisdictional consequences, should above all be clear."). *Garvin* and our initial opinion could send litigants and judges on a tour of the record to determine whether and when a public official is entitled to appeal. How much preferable it is to have a rule that can be applied using only a copy of the district court's decision and a calendar.

Our conclusion that this appeal is timely does not mean, however, that the defendants are home free. Defendants' principal argument relies on *Garcetti v. Ceballos*, 126 S. Ct. 1951 (2006), which holds that, "when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline." *Id.* at 1960. Defendants invoke *Garcetti* for the proposition that plaintiffs' speech in the workplace is not covered by the first amendment, so they are entitled to prevail even though their reactions to that speech are asserted to be extra-legal and reprehensible. Such responses may be actionable under state law in the wake of *Garcetti*, defendants allow, but cannot be treated as constitutional torts.

Plaintiffs maintain, however, that defendants reacted adversely to two kinds of speech: not only statements made as part of their duties at work (the kind of speech to which *Garcetti* applies) but also to testimony that plaintiffs gave in inmates' suits. Assistance to prisoners and their lawyers in litigation is not part of a guard's official duties. To apply *Garcetti*, therefore, we would need to determine whether

defendants reacted to plaintiffs' activities in litigation (they say not) and which of defendants' deeds can be traced to the litigation as opposed to events at work. Piecing out the state of the record, and drawing inferences from the evidence, is not allowed on an interlocutory appeal based on a claim of immunity. *See Johnson v. Jones*, 515 U.S. 304 (1995); *Via v. LaGrand*, 469 F.3d 618 (7th Cir. 2006). The role of an appeal under *Mitchell* and *Behrens* is to determine whether the legal principles that apply to public officials were clearly established at the time those officials acted; it is not to determine what the officials did in fact, for that would impinge on the jury's task.

It was clearly established long before the events of which plaintiffs complain that state actors may not assault witnesses in federal litigation. That's a crime, *see* 18 U.S.C. §1512(a)(2), so no public official could think the conduct proper. Still, an interlocutory appeal is not the forum for resolving disputes about whether defendants did what plaintiffs accuse them of. Nor is an interlocutory appeal a means to obtain review of the question whether the suit is barred by the statute of limitations. That subject has nothing to do with official immunity. Defendants appear to believe that all arguments of any stripe are open on an interlocutory appeal under *Mitchell*, but as *Jones* shows that's not so.

> When entertaining an interlocutory appeal by a public official who seeks the shelter of qualified immunity, the threshold question is: "Taken in the light most favorable to the party asserting the injury, do the facts alleged show the [public official's] conduct violated a constitutional right?" *Saucier v. Katz*, 533 U.S. 194, 201 (2001). *See also, e.g., Brosseau v. Haugen*, 543 U.S. 194, 197 (2004); *Newsome v. McCabe*, 319 F.3d 301, 303-04 (7th Cir. 2003). Only if the answer is

> affirmative does the court inquire whether the official enjoys qualified immunity. "[I]f a violation could be made out on a favorable view of the parties' submissions, the next, sequential step is to ask whether the right was clearly established." *Saucier*, 533 U.S. at 201.

Hosty v. Carter, 412 F.3d 731, 733 (7th Cir. 2005) (en banc)(bracketed material in original). Whether plaintiffs' suit is untimely does not bear on either of the questions identified in *Saucier* and *Hosty*.

Defendants' further argument that they are not state actors, because all of the guards are on the same level of the employment hierarchy, is self-defeating at this stage of the litigation. For if they are not state actors, they also are not entitled to take an interlocutory appeal. The *premise* of this appeal is that the defendants are public officials sued on account of their official conduct; by denying that premise and insisting that they behaved in a private capacity on a private frolic the defendants knock out appellate jurisdiction. *See Mitchell v. Aeolus*, 872 F.2d 577,580 (4th Cir. 1989). Lack of state action would be a reason why this suit belongs in state court under state tort law, rather than in federal court under §1983, but an argument along these lines does not assert a right not to be tried; it just asserts a right to be tried in a different forum, and such a contention does not justify an interlocutory appeal. *See Van Cauwenberghe v. Biard*, 486 U.S. 517 (1988).

Perhaps the state-actor theme can be recast as an argument that one public official's misconduct toward another at the same level of the bureaucracy cannot violate the Constitution. So put, the argument is within the first step of immunity analysis under *Saucier*. But so put the argument is a loser.

Suppose one police officer arrests another or searches his house; that step, if taken without probable cause (and a warrant, if required for the search), violates the fourth amendment. *See Acevedo v. Canterbury*, 457 F.3d 721 (7th Cir. 2006); *Driebel v. Milwaukee*, 298 F.3d 622, 649-50 (7th Cir. 2002). Suppose the white guards at a prison mercilessly harass the blackguards and make their lives miserable, or suppose the men demean the women. Such misconduct may be actionable under the Constitution. *See, e.g., Bohen v. East Chicago*, 799 F.2d 1180 (7th Cir. 1986); *Valentine v. Chicago*, 452 F.3d 670 (7th Cir. 2006). *See also, e.g., Bart v. Telford*, 677 F.2d 622 (7th Cir. 1982) (campaign of harassment against co-worker on account of speech can violate the first amendment); *Powers v. Summers*, 226 F.3d 815 (7th Cir. 2000) (same).

In litigation under Title VII of the Civil Rights Act of1964, one worker's misconduct toward another does not automatically lead to liability for the employer, because liability under that statute is direct rather than vicarious. Only employers are subject to the law's commands, and employers are responsible for what *they* do (or elect to tolerate), rather than what everyone in the work force does. *See Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998); *Faragher v. Boca Raton*, 524 U.S. 775 (1998).Things are otherwise under §1983. State agencies are not"persons" under §1983, *see Will v. Michigan Department of State Police*, 491 U.S. 58 (1989), and even units of local government are responsible only for their policies rather than misconduct by their workers. *Monell v. New York City Department of Social Services*, 436 U.S. 658 (1978). Liability falls on the misbehaving employees—which of course is why they are keen to assert immunities from suit. Whether defendants engaged in the conduct of which plaintiffs accuse them—and, if so, whether they did it to retaliate for plaintiffs' constitutionally protected

speech, or just because defendants have a mean streak—are questions hat must be resolved at trial. Arguments based on *Garcetti*, the state-action doctrine, and the statute of limitations are preserved for decision on appeal from the final judgment. *See Kurowski v. Krajewski*, 848 F.2d 767 (7th Cir. 1988).

AFFIRMED

A true Copy:

Teste:

/s/_____

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 06-2411

[Filed December 20, 2006]

ROGER FAIRLEY and RICHARD GACKOWSKI, *Plaintiffs-Appellees*,	)
v.	)
EVAN FERMAINT, NOBERTO BERCASIO, and FRED COFFEY, *Defendants-Appellants*.	)

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 03 C 5207—**Amy J. St. Eve**, *Judge*.

ARGUED NOVEMBER 7, 2006—
DECIDED DECEMBER 20, 2006

Before EASTERBROOK, *Chief Judge*, and POSNER and WOOD, *Circuit Judges*.

EASTERBROOK, *Chief Judge*. Two former guards at Cook County Jail contend in this suit under 42 U.S.C. §1983

that some of their ex-colleagues violated the Constitution's first amendment (applied to state actors via the fourteenth) by vilifying and assaulting them because they stood up for inmates' rights. According to the complaint, the defendants and their confederates bully and ostracize any guard who plays by the rules; these strong-arm tactics organize and protect guards who beat inmates at whim and then lie about their activities to their superiors, criminal investigators, and judges in any suits that the prisoners may file. Plaintiffs' allegations may or may not be true; this litigation has not reached the point at which a judge or jury sifts fact from fiction.

Defendants moved for summary judgment on the ground of official immunity, and they have appealed from the order denying this motion. Despite its interlocutory character, such an order is appealable under the approach of *Mitchell v. Forsyth*, 472 U.S. 511 (1985). But there is a wrinkle: defendants asked the court to dismiss the complaint two years ago, before discovery commenced, and did not appeal from the adverse decision. They reply that *Bahrainis v. Pelletier*, 516 U.S. 299 (1996), allows successive interlocutory appeals at the complaint and summary judgment stages, so it must logically allow defendants to forego appeal at the complaint stage and save their arguments for summary judgment.

The problem is not, however, the number of appeals but timing. Litigants have only 30 days to appeal. *See* Fed. R. App. P. 4(a)(1)(A). Having let the time pass, a litigant cannot reopen the window by re-filing the same motion or its functional equivalent and obtaining the same decision. *See Charles v. Daley*, 799 F.2d 343, 347-48 (7th Cir. 1986).That would be equivalent to abolishing the time limit. Thus we held in *Garvin v. Wheeler*, 304 F.3d 628, 632-33 (7th Cir. 2002), that when an immunity-based motion for summary

judgment duplicates a motion already made and denied—when no new facts or legal arguments are presented in support of the new motion—an appeal from the order denying summary judgment must be dismissed, because the maneuver is nothing but an effort to get around the time limit. *Cf. Vega v. Miller*, 273 F.3d 460, 465-66 (2d Cir. 2001) (new arguments allow a new appeal under *Behrens*).

In *Bahrainis* the successive motions rested on different grounds; the Supreme Court noted these differences as part of the justification for allowing multiple interlocutory appeals. 516 U.S. at 308-09. It was not possible to characterize the second interlocutory appeal in *Bahrainis* as an effort to evade the 30-day limit for filing a notice of appeal from the initial decision. The holding of *Behrens* is that both an order declining to dismiss the complaint and an order denying summary judgment are "final" decisions under 28 U.S.C. §1291 when the defendant invokes an immunity to discovery or trial; the timing for permissible appeals did not arise. In our case timing is everything, and the generally applicable rule that the window for appeal cannot be reopened by filing the same motion again covers this situation.

The rule that successive motions do not reopen the time for appeal applies to all "final decisions"—and a decision rejecting an immunity defense is "final" even though the litigation continues. The independent "finality" of such decisions is the linchpin of both *Mitchell* and *Bahrainis*. So it will not help to assert that the doctrine does not concern interlocutory decisions; an order rejecting an immunity defense is "final" rather than "interlocutory" as the Supreme Court draws that distinction.

Perhaps one could doubt the wisdom of *Garvin* because it has the potential to encourage unnecessary protective appeals.

Suppose that a public official prefers to avoid the cost and delay associated with an appeal at the complaint stage, confident that discovery either will foil plaintiffs' claims on the merits or fortify the basis of immunity. If discovery (unexpectedly) does not turn up new evidence, then *Garvin* means that the defendant cannot appeal from an order denying summary judgment: the invocation of immunity will just repeat the arguments made earlier, rendering the appeal untimely. To avoid ensnaring even the wary litigant, a court might instead say, as *Bahrainis* emphasized, that an order denying a motion to dismiss the complaint, and an order denying summary judgment, are independently "final" (for purposes of *Mitchell*), so that each has its own 30-day period for appeal no matter what arguments have been raised. Such an approach would have the additional virtue of clarity and mechanical application, much-desired qualities in any jurisdictional doctrine. *See Budinich v. Becton Dickinson & Co.*, 486 U.S. 196 (1988). But this approach also would require us to overrule *Garvin*, a step that defendants have not proposed.

Garvin cannot be treated as limited to successive motions for summary judgment and distinguished on the ground that this case involved a motion to dismiss the complaint followed by a motion for summary judgment. *Behrens* holds that an interlocutory appeal is proper from *any* decision finally rejecting a claim of official immunity. Both an order declining to dismiss a complaint and an order denying a motion for summary judgment fit that category, the Court held. There is no basis in *Bahrainis* or its predecessors for saying that all motions to dismiss must be sorted into one pile, and all motions for summary judgment into a second, with one appeal from each *category* of motion rather than from each order that is a "final decision" for the purpose of 28 U.S.C. §1291. So it does not make any difference that *Garvin* involved

successive requests under Rule 56, while this case entails one request for relief under Rule 12 and a second under Rule 56. What does matter is that in both *Garvin* and this litigation the two motions were functionally identical, and entertaining an appeal from the second decision would effectively extend the time to appeal from the first.

One effect of this understanding will be to make defendants more likely to appeal from the district court's order denying a motion to dismiss the complaint. Yet this is not the only effect. Another is to reduce the incentive to file premature motions; a defendant who refrains from filing a doomed motion to dismiss does not jeopardize a later appeal. A third effect is to induce defendants who *do* move to dismiss the complaint, and lose, to do more legal and factual digging before they file a motion for summary judgment. That effect is all to the good, because it improves the accuracy of judicial decision-making, and it is the sort of thing that *Bahrainis* contemplated would occur. Finally, in some cases the effect may be to postpone appellate review to the end of the litigation, when immunity may no longer matter (and all facts will be in focus if it still does matter). That cannot be dismissed as a trivial benefit to the judicial system.

Defendants concede that their motion for summary judgment replicated their motion to dismiss the complaint. Only the caption differed. Nothing that turned up in discovery mattered; no new legal argument was advanced.

Fortuitously, something changed *after* the district court denied defendants' renewed motion: 26 days later, the Supreme Court decided *Garcetti v. Ceballos*, 126 S. Ct. 1951 (2006), which holds that, "when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and

the Constitution does not insulate their communications from employer discipline." *Id.* at 1960. Defendants rely on *Garcetti* for the proposition that plaintiffs' speech in the workplace is not covered by the first amendment, so they are entitled to prevail even though their reactions to that speech are asserted to be extra-legal and reprehensible. Such responses may be actionable under state law in the wake of *Garcetti*, defendants allow, but cannot be treated as constitutional torts.

Although it is tempting to see in *Garcetti* the sort of change that allows an appeal without offense to the rule that repetitious arguments do not open a new 30-day period, things are not so straight forward. Plaintiffs maintain that defendants reacted adversely to two kinds of speech: not only statements made as part of their duties at work (the kind of speech to which *Garcetti* applies) but also to testimony that plaintiffs gave in inmates' suits. Assistance to prisoners and their lawyers in litigation is not part of a guard's official duties. To apply *Garcetti*, therefore, we would need to determine whether defendants reacted to plaintiffs' activities in litigation (they say not) and which of defendants' deeds can be traced to the litigation as opposed to events at work. Piecing out the state of the record, and drawing inferences from the evidence, is not allowed on an interlocutory appeal based on a claim of immunity. *See Johnson v. Jones*, 515 U.S. 304 (1995); *Via v. LaGrand*, No. 04-4011 (7th Cir. Nov. 17, 2006). The role of an appeal under *Mitchell* and *Behrens* is to determine whether the legal principles that apply to public officials were clearly established at the time those officials acted; it is not to determine what the officials did in fact, for that would impinge on the jury's task.

It was clearly established long before the events of which plaintiffs complain that state actors may not assault witnesses

in federal litigation. That's a crime, *see* 18 U.S.C. §1512(a)(2), so no public official could think the conduct proper. Still, an interlocutory appeal is not the forum for resolving disputes about whether defendants did what plaintiffs accuse them of. Nor is an interlocutory appeal a means to obtain review of the question whether defendants were engaged in state action in doing whatever they may have done; that issue is unrelated to legal uncertainty and thus to the doctrine of official immunity.

If the defendants ultimately lose this litigation, they will be entitled to raise their immunity defenses on appeal from the final decision. *See Kurowski v. Krajewski*, 848 F.2d 767 (7th Cir. 1988). All we hold today is that, while *Garvin* stands, public officials cannot use a motion for summary judgment in order to reopen the time to take an interlocutory appeal from an order declining to dismiss the complaint. Although *Garcetti* might have allowed an appeal based on new legal arguments, *Johnson v. Jones* blocks that route given the material factual disputes, resolution of which is beyond the scope of any interlocutory appeal. This appeal is dismissed for want of jurisdiction.

POSNER, *Circuit Judge*, dissenting. The majority opinion remarks:

> Perhaps one could doubt the wisdom of *Garvin* [*v. Wheeler*, 304 F.3d 628 (7th Cir. 2002)], because it has the potential to encourage unnecessary protective appeals. Suppose that a public official prefers to avoid the cost and delay associated with an appeal at the complaint stage, confident that discovery either will foil plaintiffs' claims on the merits or fortify the basis of immunity. If discovery (unexpectedly) does not turnup new evidence, then *Garvin* means that the

> defendant cannot appeal from an order denying summary judgment: the invocation of immunity will just repeat the arguments made earlier, rendering the appeal untimely. To avoid ensnaring even the wary litigant, a court might instead say, as *Bahrainis* [*v. Pelletier*, 516U.S. 299 (1996)], emphasized, that an order denying a motion to dismiss the complaint, and an order denying summary judgment, are independently "final", . . . so that each has its own 30-day period for appeal no matter what arguments have been raised. Such an approach would have the additional virtue of clarity and mechanical application, much-desired qualities in any jurisdictional doctrine. . . . But this approach also would require us to overrule *Garvin*, a step that defendants have not proposed.

The defendants have not proposed that we overrule *Garvin* for the excellent reason that *Garvin* is readily distinguishable from the present case. So if my colleagues think it should be overruled, they should not refrain from overruling it just to punish the defendant's lawyer for obtuseness in having failed to ask us to overrule it. He was not obtuse. They have over read the case.

Garvin was a case of two successive motions for summary judgment on immunity, so that by appealing from the denial of the second motion but not from the denial of the first the defendant could be thought to have tried to extend the time to appeal beyond the 30-day limit for taking an appeal. (I don't think that's an accurate characterization, but I accept it for the moment.) In our case, a motion to dismiss was denied, discovery ensued, a motion for summary judgment was made and denied, and it was from that denial that the defendants appeal. As my colleagues acknowledge in the passage I

quoted, it makes sense for a defendant not to appeal from the denial of his motion to dismiss if he thinks discovery will strengthen his case for immunity. He will balance the cost of the appeal against the cost of discovery, having regard also for the possible effect of discovery in turning a losing immunity defense into a winner and for the danger that losing an appeal from the denial of the motion to dismiss would reduce his chances of winning the subsequent appeal.

Garvin did not mention this argument, let alone reject it. It did point out that the additional discovery that the defendant conducted after the denial of the first motion for summary judgment did not turn up any facts favorable to his immunity defense. But that observation was consistent with a rule that in the absence of exceptional circumstances you cannot file identical successive motions for summary judgment on immunity and be permitted to appeal from any or all of them. That could inundate the courts of appeals with multiple appeals in the same case. You can appeal from the denial of your motion to dismiss and from the denial of your *first* motion for summary judgment, but that's it. (An alternative, more lenient rule, which *would* require overruling *Garvin* but is not necessary for the sound decision of this case, would permit one appeal from denial of summary judgment without specifying that it must be taken from the denial of the first motion for summary judgment, if as in *Garvin* there is more than one such motion; for why should we care which denial the defendant appeals from?)

The concern with inundation is the opposite in this case: if failing to appeal the denial of a motion to dismiss blocks a subsequent appeal from denial of a motion for summary judgment, then courts of appeals could be inundated by protective appeals from denials of motions to dismiss. This point was made in *Vega v. Miller*, 273 F.3d 460, 465-66 (2d

Cir. 2001), which my colleagues cite, and also in *Robbins v. Wilkie*, 433 F.3d 755, 763-64 (10th Cir. 2006), and *Grant v. City of Pittsburgh*, 98 F.3d 116, 121 (3d Cir. 1996).

Allowing the appeal in this case would not be inconsistent with the dismissal of the defendant's appeal in *Garvin*. But to see this we need to understand that whether a decision can be distinguished, in order to avoid its having precedential force in a subsequent case, or must be overruled to have that effect, depends on the breadth of its holding, and that often there is a choice as to how broadly a holding should be understood. The choice is made by courts in later cases, the cases in which the decision is argued to be a precedent. *Garvin* can be read narrowly to hold that denials of second or successive motions for summary judgment on grounds of immunity cannot be appealed unless there has been some important change since the first denial, or broadly to hold (with the same "unless" qualification) that the denial of a motion for summary judgment cannot be appealed if a motion for summary judgment *or* a motion to dismiss was denied previously. It is our choice. The panel majority, in the "Perhaps" passage that I quoted earlier, explained why the narrower reading is superior, yet unaccountably it chooses the broader reading.

Well, not quite unaccountably. For later in its opinion the majority has second thoughts, and suggests two reasons why the broader reading might be preferable after all: that it would reduce the incentive to file doomed motions to dismiss, and that it would encourage more discovery. As to the latter point, the last thing the federal courts need is more discovery. As to the former, "doomed" motions to dismiss do not take up much time of a district judge.

I said that that one way to describe an appeal from the denial of a successive motion for summary judgment that is identical to the first motion is as an attempt to extend the time for appealing from the initial denial. The panel majority embraces that interpretation as the linchpin of its decision, saying (citations omitted):

> Litigants have only 30 days to appeal. Having let the time pass, a litigant cannot reopen the window by refiling the same motion or its functional equivalent and obtaining the same decision. That would be equivalent to abolishing the time limit . . . . [I]t does not make any difference that *Garvin* involved successive requests under Rule 56, while this case entails one request for relief under Rule 12 and a second under Rule 56. What does matter is that in both *Garvin* and this litigation the two motions were functionally identical, and entertaining an appeal from the second decision would effectively extend the time to appeal from the first.

Two things are overlooked in this passage: the difference between appeals from final judgments and interlocutory appeals, and the difference between motions to dismiss and motions for summary judgment.

Suppose a final judgment is rendered and the losing party does not appeal within the 30 or 60 days or whatever time is allowed for filing the appeal, but later thinks better of his decision, files a Rule 60(b) motion to vacate the judgment, appeals from the denial, and argues in the appeal that the judgment was wrong. That would indeed be a case of using an appeal from the denial of a motion as a means of extending the time for appealing an earlier ruling, and it would be objectionable because it would deny finality to the litigation.

The defendants in this case are not trying to reopen a completed litigation. When they filed their motion to dismiss there was no final judgment; when they filed their motion for summary judgment there was no final judgment; and there still is no final judgment. It made and makes no difference to anyone whether they appealed from the denial of their motion to dismiss, or passed and appeal instead from the denial of their motion for summary judgment. The only effect of today's decision will be to engender the filing of protective appeals. What is the point? To honor *stare decisis*? But read narrowly, for the reason that the panel majority itself suggests in the "Perhaps" passage, *Garvin* does not control the present case; and it is entirely legitimate to read it narrowly. Courts read precedents broadly or narrowly depending on what the courts have learned subsequent to the precedents.

The other difference that the panel majority overlooks is the difference between a motion to dismiss and a motion for summary judgment. Defendants are entitled to immunity if their "conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). As the Court explained in *Bahrainis v. Pelletier*, *supra*, 516 U.S. at 309 (emphasis in original),"the legally relevant factors bearing upon the *Harlow* question will be different on summary judgment than on an earlier motion to dismiss. At that earlier stage, it is the defendant's conduct *as alleged in the complaint* that is scrutinized for 'objective legal reasonableness.' On summary judgment, however, the plaintiff can no longer rest on the pleadings, *see* Fed. Rule Civ. Proc. 56, and the court looks to the evidence before it (in the light most favorable to the plaintiff) when conducting the *Harlow* inquiry." If a motion to dismiss on immunity grounds fails, it is natural for the defendant to decide that he had better try to find some evidence rather than take an appeal

that he may be quite likely to lose. But he cannot know before discovery begins how productive discovery will be. There is no reason why, if he strikes out in discovery, as in this case, he should be denied an appellate determination as to whether the case should have been dismissed because he satisfied the *Harlow* standard. This approach is a natural extension of *Bahrainis*; it is consistent with *Garvin*; and it harms no one—its only effect being to head off protective appeals. We have jurisdiction of the appeal, and should proceed to the merits.

A true Copy:

Teste:

/s/_____
Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 03 C 5207

[Filed May 4, 2006]

ROGER FAIRLEY and RICHARD GACKOWSKI, Plaintiffs,

v.

SUPT. DENNIS ANDREWS, LT. EDWARD BYRNE, SGT. PATRICK LOIZON, OFC. EVAN FERMAINT OFC. NOBERTO BERCASIO, OFC. FRED COFFEY, OFC. RONALD PROHASKA, INVESTIGATOR GREGORY ERNST, FORMER CHIEF INVESTIGATOR SAUL WEINSTEIN, CHIEF INVESTIGATOR TIM KAUFMANN, OFC. GABRIEL OCHOA, CHIEF INVESTIGATOR JUAN DIAZ, in their individual and official capacities, SHERIFF MICHAEL SHEAHAN, in his official capacity, and COOK COUNTY, Defendants.

JUDGES: AMY J. ST. EVE, United States District Court Judge.

MEMORANDUM OPINION AND ORDER

AMY J. ST. EVE, District Court Judge:

Plaintiffs Roger Fairley and Richard Gackowski filed a Second Amended Complaint alleging that Defendants violated their First Amendment rights to the United States Constitution in violation of 42 U.S.C. § 1983. Before the Court are Defendants' Motions for Summary Judgment pursuant to Federal Rule of Civil Procedure 56(c). For the reasons discussed in detail below, the Court grants in part and denies in part Defendant Sheriff Michael Sheahan's Motion for Summary Judgment. The Court grants in part and denies in part Defendant Edward Byrne's and Defendant Dennis Andrews' Motions for Summary Judgment. Further, the Court grants in part and denies in part Defendants Evan Fermaint's, Noberto Bercasio's, Fred Coffey's and Ronald Prohaska's Motion for Summary Judgment. The Court also grants Defendant Juan Diaz's, Defendant Patrick Loizon's and Defendant Gregory Ernst's Motions for Summary Judgment in their entirety. Finally, the Court grants in part and denies in part Timothy Kaufmann's and Saul Weinstein's Motions for Summary Judgment.

BACKGROUND[1]

I. The Parties

Plaintiffs Roger Fairley and Richard Gackowski are former correctional officers at the Cook County Department of Corrections ("CCDOC"), who resigned from the CCDOC on February 4, 2003. (R. 447-1, Defs.' Joint Local Rule 56.1(a)(3) Stmt. Facts. ¶¶ 1, 2; R. 553-1, Pls.' Corrected Rule 56.1(b)(3) Stmt. Add'l Facts ¶ 420.) During the relevant time period, Defendant Dennis Andrews was the superintendent of Division I, Defendant Edward Byrne was a correctional officer with the rank of lieutenant, and Defendant Patrick Loizon was a correctional officer with the rank of sergeant at the CCDOC. (*Id.* ¶¶ 3-5.) Defendants Evan Fermaint, Noberto Bercasio, Fred Coffey, and Ronald Prohaska were all correctional officers at the CCDOC during

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[1] The Court derives the background facts from the parties' Northern District of Illinois Local Rule 56.1 statements. The majority of Defendants' objections to Plaintiffs' Rule 56.1(b)(3) Statement of Facts are based on hearsay, although Defendants do not explain how or why each challenged statement is inadmissible hearsay. *See* Fed.R.Evid. 801(c) ("'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."); *see also Eisenstadt v. Centel Corp.*, 113 F.3d 738, 742 (7th Cir. 1997) ("hearsay is inadmissible in summary judgment proceedings to the same extent that it is inadmissible in a trial."). Witnesses, however, may testify to their observations and give opinions based on their own personal knowledge. *See* Fed.R.Evid. 602, 701; *United States v. Joy*, 192 F.3d 761, 767 (7th Cir. 1999) ("Because most knowledge is inferential, personal knowledge includes opinions and inferences grounded in observations or other first-hand experiences.").

the pertinent time period. (*Id.* ¶¶ 6-9.) Defendant Gregory Ernst was an investigator with the Internal Affairs Division ("IAD") of the CCDOC and Defendant Saul Weinstein and Juan Diaz served as Chief Investigators at IAD. (*Id.* ¶¶ 10, 11, 14.) Defendant Timothy Kaufman was an investigator with the Cook County Sheriff's Police Department and Defendant Michael Sheahan served as the Sheriff of Cook County. (*Id.* ¶¶ 12, 15.) Cook County and Gabriel Ochoa are no longer Defendants in this lawsuit. (*Id.* ¶ 13.)

II. CCDOC Training Academy

Fairley attended the CCDOC Training Academy from October 31, 1994 until January 27, 1995. (*Id.* ¶ 55; Pls.' Stmt. Add'l Facts ¶ 1.) At his deposition, Fairley testified that while on a visit to Division II of the CCDOC with his training academy class, he witnessed a correctional officer take a pool stick and hit an inmate who was using crutches. (Pls.' Stmt. Add'l Facts ¶ 2; Defs.' Ex. 8, Fairley Dep. at 448-66.) Fairley further testified that the next day during class, an academy cadet complained about the incident. (*Id.* ¶ 4, Defs.' Ex. 8, Fairley Dep. at 463.) After that, Fairley stated that an academy instructor told Fairley's class that the cadets stick together and that they should not make bad remarks about anyone because "unity is the key." (*Id.* ¶ 6, Defs.' Ex. 8, Fairley Dep. at 462-63.)

Gackowski began training at the CCDOC Training Academy on June 12, 1995 and was part of the Class of 95-4. (Defs.' Stmt. Facts ¶ 43; Pls.' Stmt. Add'l Facts ¶ 7.) At his deposition, Gackowski testified that he and his training academy class visited the Cook County Jail and witnessed officers throw a handcuffed inmate face-first into a bench. (Pls.' Stmt. Add'l Facts ¶ 8; Defs.' Ex. 1, Gackowski Dep. at 131.) Gackowski further testified that while in training, a

sergeant illustrated how to speed cuff inmates and that it was possible to shatter the inmate's bones in doing so. (*Id.* ¶ 15, Defs.' Ex. 1, Gackowski Dep. at 126.) According to Gackowski, the sergeant then joked that the reporting officer would never know how the bones became shattered. (*Id.* ¶ 16, Defs.' Ex. 1, Gackowski Dep. at 126-27.) Further, Gackowski testified that a training sergeant told them after an Internal Affairs class that the IAD investigators were not their friends, but instead they were there to "trip up" the correctional officers. (*Id.* ¶ 25, Defs.' Ex. 1, Gackowski Dep. at 117-18.) The sergeant further explained to the cadets that they should be careful when they write their reports and that they should not "set each other out." (*Id.*)

Former correctional officer, Ricky Rodriguez, who started at the Training Academy in June of 1996, testified that:

> The code of silence is brought up to us and I believe it's brought up to us in the Redman training, that we are the officers, they are the inmates, we are the good guys, they are the bad guys. If you expect your fellow officers to back you up, you need to back them up, so basically what goes on in the jail stays in the jail.

(*Id.* ¶¶ 18, 19, Pls.' Ex. 33, Rodriguez Dep. at 211.)

III. Division I Incidents

After their academy training, both Fairley and Gackowski worked in Division I of the Cook County Jail during part of the relevant time period and became friends. (Defs.' Stmt. Facts ¶¶ 21, 26, 35-38.) Fairley testified that while working in Division I in late 1998 or early 1999, he witnessed Defendant Coffey and another correctional officer hit two inmates. (Pls.' Stmt. Add'l Facts ¶ 46, Defs.' Ex. 8, Fairley

Dep. at 507-09.) Fairley then told another officer to get a supervisor. (*Id.* ¶ 47, Defs.' Ex. 8, Fairley Dep. at 509-10.) After the incident, Fairley testified that he told a sergeant about it, after which Coffey called Fairley a snitch and threatened to beat him up. (*Id.* ¶¶ 48, 50, Defs.' Ex. 8, Fairley Dep. at 510-13.)

Gackowski testified that on April 1, 2000 he witnessed Coffey punch and kick inmate Rodney Brown. (*Id.* ¶ 51, Defs.' Ex. 1, Gackowski Dep. at 295-96.) After Brown fell to the floor, Gackowski testified that Coffey continued to kick Brown. (*Id.*, Defs.' Ex. 1, Gackowski Dep. at 296.) According to Gackowski, he yelled at Coffey while Coffey was beating Brown and told Coffey not to include him as a witness in his report. (*Id.* ¶ 53, Defs.' Ex. 1, Gackowski Dep. at 286.) After the Brown incident, Gackowski testified that he told his supervising sergeant about the beating. (*Id.* ¶ 54, Defs.' Ex. 1, Gackowski Dep. at 296-97.) Coffey subsequently told Gackowski that he was not "part of the team." (*Id.* ¶ 57, Defs.' Ex. 1, Gackowski Dep. at 183.) Also after this April 2000 incident, Gackowski testified that Defendant Fermaint started calling him a snitch. (*Id.* ¶ 58, Pls.' Ex. 19, Gackowski Dep. at 207-08.) Similarly, Defendants Coffey, Fermaint, and Bercasio started calling Gackowski a "social worker." (*Id.* ¶ 59, Defs.' Ex. 1, Gackowski Dep. at 403-04.)

IV. The July 29, 2000 Incident

Fairley testified at his deposition that on July 29, 2000 he saw Fermaint and another correctional officer abuse inmates, including Nathson Fields and James Scott, in the SI-2 (Special Incarceration Unit Two), which is the maximum security tier located in the basement of Division I. (Defs.' Stmt. Facts ¶¶ 64, 65; Pls.' Stmt. Add'l Facts ¶ 71.) Fairley testified that

other officers, including Bercasio, also beat some inmates while they were handcuffed and shackled. (Pls.' Stmt. Add'l Facts ¶ 72; Defs.' Ex. 8, Fairley Dep. at 691, 922-23.) Further, Fairley stated that he told the officers to stop beating the inmates and subsequently reported the beating to his supervisors. (*Id.* ¶¶ 76, 93.) Also, Fairley testified that after the incident, Lieutenant Byrne told him not to write up a report and that IAD would interview him, yet no investigator from IAD ever interviewed Fairley in connection with the incident. (*Id.* ¶¶ 79, 80.) Defendant Superintendent Andrews was also informed about the altercation in Division I on July 29, 2000. (*Id.* ¶ 81.) Furthermore, Fairley told Gackowski along with other correctional officers about the beating he had witnessed on July 29, 2000. (Pls.' Stmt. Add'l Facts ¶¶ 91, 98.)

Gackowski did not witness any of the events on July 29, 2000 in the SI-2 because he was assigned to Division VIII, which houses the Cermak Hospital Emergency Room. (*Id.* ¶ 82; Defs.' Stmt. Facts ¶¶ 66-70.) He nonetheless heard about the incident from officers in Division VIII. (Pls.' Stmt. Add'l Facts ¶ 83.) At the emergency room, Gackowski saw some of the injured officers and inmates, including inmate Scott, who were involved in SI-2 altercation. (*Id.* ¶ 84; Defs.' Stmt. Facts ¶¶ 72, 73.) Although Gackowski saw Scott very briefly, he testified at his deposition that Scott's face was swollen and that he was bleeding. (Pls' Stmt. Add'l Facts ¶ 85; Defs.' Stmt. Facts ¶¶ 71, 73.)

Gackowski was transferred back to Division I in August 2000. (*Id.* ¶ 86.) He testified at his deposition that on the day he returned to Division I, he talked to Byrne about the SI-2 incident and Byrne explained that some of the inmates had tried to jump the correctional officers. (*Id.* ¶ 87, Defs.' Ex. 1, Gackowski Dep., at 768-69; Defs.' Stmt. Facts ¶ 85.) The

parties dispute whether Byrne told Gackowski that Byrne had tried to break one of the inmate's legs. (*Id.* ¶ 89.)

In August 2000 after the SI-2 incident, certain inmates filed a lawsuit in state court known as the "Fields Litigation," which named Lieutenant Byrne as one of the defendants. (*Id.* ¶¶ 104, 105.) The Fields Litigation received a significant amount of publicity in the Chicago area. (*Id.* ¶¶ 106-123.) In addition, correctional officers and other staff in Division I discussed the Fields Litigation. (*Id.* ¶¶ 91, 93, 94, 124.) In April 2001, a letter from the Sheriff's Office informed the Division I correctional officers about the Fields Litigation. (*Id.* ¶¶ 165-172.) Superintendent Andrews discussed this letter with the correctional officers who received it, including Fermaint and Byrne. (*Id.* ¶¶ 169-171.) In the interim, Gackowski testified that he told correctional officer Rodriguez that he was going to tell the truth about the SI-2 incident. (*Id.* ¶ 97.) Similarly, Fairley told a number of correctional officers that he was not going to lie about the SI-2 incident. (*Id.* ¶ 103.)

Eventually, Fairley and Gackowski gave deposition testimony in the Fields Litigation. (*Id.* ¶ 401; Defs.' Stmt. Facts ¶ 101.) Prior to Fairley's testimony, a private investigator went to Fairley's residence, after which Fairley reported the investigator's visit to Superintendent Andrews. (*Id.* ¶¶ 147, 157.) After his conversation with Fairley, Andrews contacted IAD, the CCDOC's Executive Director's Office, and Sheriff Sheahan's Chief Legal Counsel to inform them that an investigator had been to Fairley's house. (*Id.* ¶ 161.)

V. Alleged Harassment and Retaliation After the July 29, 2000 Incident

After the July 29, 2000 incident, Fairley testified that Fermaint refused to provide enough lunches and other supplies for the SI-2 inmates which caused the inmates to become irate and yell at Fairley. (*Id.* ¶¶ 252, 253.) Fairley also testified that Fermaint and Bercasio would "dry hump" him -- meaning that they would physically grab him by the waist and imitate anal intercourse. (*Id.* ¶¶ 254, 256.) Moreover, Fairley testified that Fermaint and Bercasio also harassed him by failing to unlock the security door to the SI-2 Unit to allow Fairley to use the restroom, in addition to calling him an "inmate lover." (*Id.* ¶¶ 240, 251.) Evidence in the record also reveals that Byrne assigned Fairley difficult assignments and denied him paternity leave. (*Id.* ¶¶ 214, 216, 221, 224, 228.) According to Fairley, Defendant Loizon assigned him to the difficult task of escorting inmates to Cermak hospital at the end of his shift. (*Id.* ¶ 222, Defs.' Ex. 8, Fairley Dep. at 847-48.)

Further, Bercasio drew sexually explicit cartoons of Gackowski and had them posted around Division I. (*Id.* ¶¶ 257, 258; Defs.' Stmt. Facts ¶ 121.) Gackowski also testified that from late 2000 through May or June 2002, Bercasio and Fermaint "dry humped" him by physically grabbing him and imitating anal intercourse. (Pls.' Stmt. Add'l Facts ¶ 262; Defs.' Stmt. Facts ¶ 121.) The record contains undisputed evidence that Gackowski reported the correctional officers' harassment to Byrne. (Defs.' Stmt. Facts ¶ 112.)

VI. Gackowski's Complaint to Internal Affairs

On June 14, 2002, Gackowski told Superintendent Andrews that he might file a complaint with Internal Affairs concerning the officers' harassment. (Defs.' Stmt. Facts. ¶ 116.) Gackowski also testified that on June 15, 2002, he told Lieutenant Byrne that he was going over Superintendent Andrews' head and would report the various officers' harassing conduct to Internal Affairs. (*Id.* ¶¶ 91, 117; Pls.' Stmt. Add'l Facts ¶¶ 264, 269.) Gackowski testified at his deposition that Byrne told him that if he did go to Internal Affairs, repercussions would follow. (Pls.' Stmt. Add'l Facts ¶ 266.) Moreover, Gackowski stated that he informed other Defendants that he was going to go to Internal Affairs with his complaints. (*Id.* ¶¶ 267, 268.) Also, in or about June or July 2002, Gackowski, by giving an investigation statement, told Defendant Gregory Ernst of Internal Affairs that certain officers were harassing him. (*Id.* ¶ 270; Defs.' Ex. 20, Gackowski's 2002 Internal Affairs Stmt.)

On July 9, 2002, Gackowski submitted a written complaint to Internal Affairs alleging that he was the subject of harassment by other correctional officers. (*Id.* ¶ 272; Defs.' Stmt. Facts ¶ 119.) Saul Weinstein, the Chief Investigator of IAD, did not initiate an investigation into Gackowski's allegations, but instead forwarded Gackowski's complaint back to Division I and Superintendent Andrews. (Pls.' Stmt. Add'l Facts ¶ 274.) Gackowski testified that when he went to Andrews' office, Andrews berated him for submitting the IAD complaint. (*Id.* ¶ 280.) In addition, Andrews told Gackowski that he would sue Gackowski for slander because of the statements Gackowski made in the IAD complaint. (R. 454-1, Def. Andrews Rule 56.1(a)(3) Stmt. Facts ¶ 11.) Nevertheless, Andrews contacted Weinstein and told him that he was sending Gackowski's complaint back to

IAD because it was a "conflict of interest" for Andrews to investigate a complaint in which he was a named subject. (Pls.' Stmt Add'l Facts ¶ 282.)

After Gackowski's complaint was returned to IAD, Investigator Gregory Ernst was assigned to the case and interviewed Gackowski about his allegations. (*Id.* ¶¶ 303, 304.) In his statement to Ernst, Gackowski identified officers who had harassed him, including Fermaint and Bercasio, and described the harassment -- including physical grabbing, sexually suggestive cartoons, and degrading and sexual comments about his wife. (*Id.* ¶ 305, Defs.' Ex. 20, Gackowski's 2002 Internal Affairs Stmt.) Gackowski told Ernst that he believed he had been singled out for harassment because he did not "smack inmates around for no reason." (*Id.* ¶ 306.) Further, Gackowski explained to Ernst that he had witnessed Fermaint, Byrne, and Coffey abuse inmates and specifically described the Rodney Brown incident. (*Id.* ¶¶ 308, 314.) There is also evidence in the record that other correctional officers knew that Gackowski had made a report to the IAD, especially because a Division I Chief spoke to everyone identified in Gackowski's IAD complaint. (*Id.* ¶¶ 291, 316, 321-326.)

On September 20, 2002, Ernst reported to the Chief of IAD, Saul Weinstein, that Gackowski had filed a complaint with the Illinois Human Rights Department and Weinstein advised Ernst to put the investigation into Gackowski's IAD complaint on hold until the completion of the Human Rights investigation. (*Id.* ¶¶ 327, 328.) Gackowski contends that no one ever told him that his IAD investigation was put on hold. (*Id.* ¶ 335.)

VII. Lipscomb Incident

On December 20, 2002, there was an altercation between inmate Keon Lipscomb and Fairley, as well as other correctional officers. (Defs.' Stmt. Facts ¶ 214.) On that date, Fairley was scheduled to transport Lipscomb for his "medical movement." (Pls.' Stmt. Add'l Facts ¶¶ 337-339; Defs.' Stmt Facts ¶ 216.) After Lipscomb's "medical movement" was cancelled, Lipscomb would not follow Fairley's orders. (Pls.' Stmt. Add'l Facts ¶ 342; Defs.' Stmt Facts ¶ 220.) Thereafter, Bercasio, Byrne, and Loizon came to Fairley's assistance. (Defs.' Stmt. Facts ¶ 223.) Lipscomb attacked Fairley, Bercasio tackled Lipscomb from behind, and Fairley fell back during which Fairley sustained a cut to his wrist. (Pls.' Stmt. Add'l Facts ¶¶ 348, 349.) After that, other correctional officers helped subdue Lipscomb. (*Id.* ¶ 350.)

Thereafter, the Sheriff's Office Investigator, Timothy Kaufmann, began his investigation of the Lipscomb incident. (*Id.* ¶ 361; Defs.' Stmt. Facts ¶ 233.) Kaufmann interviewed Fairley as well as other the officers involved. (Defs.' Stmt. Facts ¶ 237.) An Assistant States Attorney, Bumjoon Park, also conducted a felony review into the Lipscomb incident and interviewed Fairley and the officers. (*Id.* ¶¶ 238, 240, 246.) In the course of the investigation, Fairley told Kaufmann and Park that he believed he was being set up in retaliation for speaking the truth about the July 29, 2000 incident and his upcoming testimony in the Fields Litigation. (Pls.' Stmt. Add'l Facts ¶ 364, Pls.' Ex. 25, Kaufman Dep. at 51, Pls.' Ex. 30, Park Dep. at 69.) Kaufmann's final report of the Lipscomb incident stated that he and Assistant States Attorney Park concluded that charges against Lipscomb were not warranted because of Fairley's inconsistent statements. (*Id.* ¶ 367.) Park, however, testified at his deposition that he did not tell Kaufmann that the States Attorney's Office would not

approve felony charges or that he found Fairley to be incredible. (*Id.* ¶¶ 368, 369, Pls.' Ex. 30, Park Dep. at 27, 63-64.) The States Attorney's Office never brought criminal charges against Lipscomb regarding his assault on Fairley. (*Id.* ¶ 375; Defs.' Stmt. Facts ¶ 253.)

VIII. Prohaska Threat

Shortly after the Lipscomb incident, Gackowski testified that he encountered Defendant Prohaska in Division I, after which Prohaska asked Gackowski about Fairley's testimony in the Fields Litigation. (Pls.' Stmt. Add'l Facts ¶¶ 382-384.) During their encounter, Gackowski asserts that Prohaska stated that Fairley was a weak link and that they had to "bury" the weak link. (*Id.* ¶ 384.) Also, Gackowski asserts that Prohaska made disparaging remarks about him. (*Id.* ¶ 385.) On January 9, 2003, Gackowski filed a IAD complaint regarding the Prohaska threat. (Defs.' Stmt. Facts ¶ 168.)

SUMMARY JUDGMENT STANDARD

Summary judgment is proper when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). A genuine issue of material fact exists only if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986). The party seeking summary judgment has the burden of establishing the lack of any genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986). In determining whether a

genuine issue of material fact exists, the Court construes the facts in a light most favorable to the non-moving party and draws all reasonable inferences in favor of that party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. at 255. The existence of a factual dispute alone is not sufficient to defeat a summary judgment motion, instead the non-moving party must present definite, competent evidence to rebut the summary judgment motion. *Butts v. Aurora Health Care, Inc.*, 387 F.3d 921, 924 (7th Cir. 2004).

ANALYSIS

I. First Amendment Retaliation Claim -- Count I

The First Amendment protects freedom of speech and expressive conduct and generally prevents the government from proscribing such activities. *RAV v. City of St. Paul, Minnesota,* 505 U.S. 377, 382, 112 S.Ct. 2538, 2542, 120 L.Ed.2d 305 (1992). "It is by now well established that the government may not arbitrarily silence the constitutionally-protected speech of its employees. Government workers do not forfeit their First Amendment rights simply by accepting public sector employment." *Wernsing v. Thompson,* 423 F.3d 732, 750 (7th Cir. 2005). Although public sector employees retain their First Amendment rights to free speech, a public employee does not possess unlimited rights of speech and expression on matters related to official responsibilities. *Sullivan v. Ramirez,* 360 F.3d 692, 697 (7th Cir. 2004) (citing *Pickering v. Board of Educ. of Twp. High Sch. Dist. 205,*391 U.S. 563, 568, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968)); *see also Connick v. Myers,* 461 U.S. 138, 146, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983) (employee's speech may be protected if matter of public concern).

In determining a Section 1983 claim for retaliation in violation of a public employee's First Amendment rights, the Court conducts a three-step inquiry: (1) the Court first determines whether the employee's speech was constitutionally protected under the *Connick - Pickering* test; (2) Plaintiffs then must show that their speech was a substantial or motivating factor in the retaliation; and (3) Defendants may rebut Plaintiffs' contentions by establishing that Defendants would have taken the same action in the absence of Plaintiffs' protected speech. *Ashman v. Barrows,* 438 F.3d 781, 784 (7th Cir. 2006); *Sullivan v. Ramirez,* 360 F.3d at 697-98. Plaintiffs have the burden of establishing the first two prongs because they constitute the prima facie elements of a First Amendment retaliation claim. *Carreon v. Illinois Dep't of Human Servs.*, 395 F.3d 786, 791 (7th Cir. 2005). "If the plaintiff establishes these elements, the burden shifts to the defendant to prove by a preponderance of the evidence that it would have taken the same action in the absence of the protected speech." *Id.*

A. Connick-Pickering Test

Defendants do not address whether Gackowski's and Fairley's speech was a matter of public concern under *Connick,* nor do they discuss the balancing test as required under *Pickering*. Because the *Connick-Pickering* test is a prima facie element of Plaintiffs' retaliation claim, the Court addresses this first step for the sake of completeness.

1. Matter of Public Concern

Under *Connick,* the Court must determine whether each Plaintiff spoke "as a citizen upon matters of public concern." *Connick,* 461 U.S. at 147. To do so, the Court examines "the content, form, and context of a given statement, as revealed

by the whole record." *Id.* at 147-48. The *Connick* public concern element must relate to a community concern, and thus cannot relate to an employee's personal grievance. *Carreon,* 395 F.3d at 791; *see also Cygan v. Wisconsin Dep't of Corr.*, 388 F.3d 1092, 1099 (7th Cir. 2004) (speech must be matter of political, social, or other community concern).

Looking to the content, form, and context of Plaintiffs' speech, it involved other correctional officers physically abusing inmates at the Cook County Jail. Plaintiffs' speech took the form of complaints and statements to other correctional officers, supervisors, and investigators about this alleged excessive force, as well as their testimony in the Fields Litigation. Such speech is not a mere personal concern, but pertains to a social and public concern as required under *Connick. See Glass v. Dachel,* 2 F.3d 733, 741 (7th Cir. 1993) ("speech that focuses on police departments (and ultimately police protection and public safety) involve matters of great public concern"); *see also Kinney v. Weaver,* 367 F.3d 337, 356 (5th Cir. 2004) (en banc) ("plaintiff's testimony regarding the use of excessive force by police officers was unquestionably a matter of public concern").

2. Balancing Interests

Under the *Pickering* prong, the Court balances the interests of the employee "as a citizen, in commenting upon matters of public concern" against "the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Pickering,* 391 U.S. at 568. In other words, governmental units may restrict a public employee's speech if the government can show that its interest in promoting effective and efficient public service outweighs the employee's interest as a citizen commenting on

matters of public concern. *Carreon,* 395 F.3d at 791(citing *Gustafson v. Jones,* 290 F.3d 895, 909 (7th Cir. 2002)).

Although an employer's concern regarding the disruptive nature of an employee's speech is important in the context of law enforcement, when an employee reports illegal conduct, such speech is necessarily protected. *See McGreal v. Ostrov,* 368 F.3d 657, 678 (7th Cir. 2004) (citation omitted). Therefore, the CCDOC's need to perform efficient public service does not outweigh Plaintiffs' interests as citizens commenting on inmate abuse and the alleged excessive force at the Cook County Jail. *See Carreon,* 395 F.3d at 791.

B. Substantial or Motivating Factor

The next element of Plaintiffs' prima facie case is whether Plaintiffs' protected speech was a substantial or motivating factor in the alleged retaliation and harassment. *See Ashman v. Barrows,* 438 F.3d at 784; *see also Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle,* 429 U.S. 274, 287, 97 S.Ct. 568, 50 L.Ed.2d 471 (1977). The "motivating factor does not amount to a but-for factor or to the only factor, but is rather a factor that motivated the defendant's actions." *Spiegla v. Hull,* 371 F.3d 928, 942 (7th Cir. 2004).

Defendants contend that their conduct was not a motivating factor in the retaliation and harassment because they did not know of Plaintiffs' protected speech in the first instance. Defendants base their argument on *Stagman v. Ryan,* 176 F.3d 986, 999 (7th Cir. 1999), in which the Seventh Circuit concluded that to establish the "motivating factor" element, plaintiffs must demonstrate that defendants knew of plaintiff's constitutional activities. In *Stagman,* the Seventh Circuit concluded that the plaintiff had failed to raise a genuine issue of material fact regarding whether his

supervisor knew of his constitutionally protected union activities. *See id.* The Court thus turns to whether the individual Defendants knew of Plaintiffs' constitutional activities.

1. Correctional Officers and Supervisors[2]

Defendants Fermaint, Bercasio, Prohaska, Coffey, Loizon, Byrne, and Andrews argue that they were unaware of Plaintiffs' constitutional activities, namely, that Plaintiffs engaged in protected speech. Plaintiffs' protected speech involved speaking out against inmate abuse and excessive force at the Cook County Jail. As Judge Castillo explained in denying Defendants' qualified immunity claim, a "reasonable person in Defendants' position would have known that retaliating and harassing someone because of something they

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[2] Defendants Fermaint, Bercasio, Prohaska, Coffey, and Loizon contend that they cannot be found liable on Plaintiffs' First Amendment retaliation claim because only supervisors can take adverse employment actions. Further, Superintendent Andrews argues that he took no actions against Plaintiffs that can be considered adverse employment actions. Defendants' arguments are without merit because Section 1983 lawsuits do not require an adverse employment action within the meaning of the anti-discrimination statutes, such as Title VII. *Spiegla v. Hull,* 371 F.3d 928, 941 (7th Cir. 2004). Instead, any deprivation that is likely to deter the exercise of free speech is actionable. *Id.; see also DeGuiseppe v. Village of Bellwood,* 68 F.3d 187, 192 (7th Cir. 1995) ("Under the law of this Circuit, retaliation need not be monstrous to be actionable under the First Amendment; it need merely create the potential for chilling employee speech on matters of public concern.").

said or wanted to say was unconstitutional." *Fairley v. Andrews,* 300 F.Supp.2d 660, 668-69 (N.D. Ill. 2006).[3]

Despite Defendants' argument, Plaintiffs have set forth competent evidence establishing a genuine issue of material fact that they openly spoke out against the inmate abuse and excessive force at the Cook County Jail, especially concerning the SI-2 incident that resulted in the Fields Litigation, and that these Defendants were aware of this protected speech. Fairley testified that he told Fermaint and Bercasio to stop beating inmates during the SI-2 incident and that he told many of his fellow correctional officers about this incident. Plaintiffs also testified that they told other correctional officers they would not lie about the SI-2 incident.

Evidence also exists that other correctional officers and supervisors were put on notice of Plaintiffs' protected speech and the SI-2 incident. For example, in April 2001, the Sheriff's Office sent a letter to Division I correctional officers about the Fields Litigation and Superintendent Andrews discussed this letter with the correctional officers who received it, including Fermaint and Byrne. Also, Fairley

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[3] Judge Castillo already ruled that Defendants did not establish qualified immunity because Plaintiffs' right to free speech under the circumstances was clearly established. *Fairley v. Andrews,* 300 F.Supp.2d 660, 668-69 (N. D. Ill. 2006) (citing *Connick v. Myers,* 461 U.S. 138, 142, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983)). Because this ruling is the law of the case, the Court will not reopen this issue unless the decision is "clearly erroneous and would work a manifest injustice." *Moriarty v. Svec,* 429 F.3d 710, 722-23 (7th Cir. 2005) (citation omitted). Defendants fail to give any compelling reasons for the Court to conclude that this previous ruling was clearly erroneous and would result in a manifest injustice, thus the Court will not revisit Judge Castillo's ruling.

testified that after the SI-2 incident, Lieutenant Byrne told him not to write up a report and that IAD would interview him, yet no investigator from IAD ever interviewed Fairley in connection with the incident. Furthermore, Gackowski testified that Byrne told him about his actual involvement in the SI-2 incident.

As far as Gackowski's IAD complaint, Gackowski told Superintendent Andrews that he might file a complaint with Internal Affairs concerning the officers' harassment and told Lieutenant Byrne that he was going over Superintendent Andrews' head and would report the various officers' harassing conduct to Internal Affairs. Thereafter, Byrne told Gackowski that if he went to Internal Affairs, repercussions would follow. The record also reveals that other correctional officers knew of Gackowski's IAD compliant, especially because a Division I Chief spoke to everyone identified in Gackowski's IAD complaint that included Byrne, Fermaint, Bercasio and Coffey.

Similarly, there is competent, definite evidence that the CCDOC Defendants retaliated or harassed Plaintiffs after Plaintiffs engaged in protected speech, including evidence that Gackowski told Byrne and Andrews that he was reporting officer harassment to IAD in 2002 and Andrews subsequently berated and threatened to sue Gackowski about statements made in this IAD report. In addition, Fairley testified that Byrne told him not to fill out a report about the SI-2 incident, and thereafter assigned Fairley difficult tasks and refused his request for paternity leave. Also, Plaintiffs have presented evidence that in reference to the Fields Litigation, Prohaska threatened Fairley and Gackowski by saying that they needed to "bury" the weak link.

Moreover, Fairley testified that after he witnessed Coffey hit two inmates in late 1998 or early 1999 and reported the incident to a sergeant, Coffey started calling him a snitch and threatening to beat him up. Gackowski testified that after he witnessed Coffey punch and kick inmate Rodney Brown and asked Coffey to stop, he later reported the incident to the supervising sergeant. After the Brown incident, Coffey told Gackowski that he was not part of the team and Fermaint started calling him a snitch. Further, Coffey, Fermaint, and Bercasio mocked Gackowski by calling him a "social worker," and Fermaint and Bercasio "dry-humped" both Gackowski and Fairley on several occasions after these incidents.

Construing this evidence and all reasonable inferences in a light most favorable to Plaintiffs -- as the Court must do at this procedural posture -- there is a genuine issue of material fact that Fermaint, Bercasio, Prohaska, Coffey, Byrne, and Andrews knew of Plaintiffs' constitutional activities -- namely, their speech against inmate abuse and excessive force at the Cook County Jail -- and thereafter either retaliated or harassed Plaintiffs.

Meanwhile, although Plaintiffs identify evidence that Sergeant Loizon assigned Fairley undesirable tasks, Plaintiffs fail to point to any specific evidence that Sergeant Loizon knew of Plaintiffs' protected speech. In fact, in their legal memorandum, Plaintiffs do not argue that it is reasonable to conclude that Loizon knew about the Fields Litigation. (*See* R. 553-2, Pls.' Corrected Resp. at 39.) Accordingly, without more definite, competent evidence to rebut Loizon's summary judgment motion, Plaintiffs' claim against Loizon must fail. *See Butts,* 387 F.3d at 924; *see also* Fed. R. Civ. P. 56(e) (adverse party must set forth specific facts showing that there

is genuine issue for trial). The Court grants Loizon's Motion for Summary Judgment as to Count I.

Finally, the Court rejects the correctional officers' argument that their conduct was not under the "color of state law" for purposes of Section 1983 liability. Judge Castillo's prior ruling on Defendants' motion to dismiss rejected this precise argument, *see Fairley v. Andrews,* 300 F.Supp.2d 660, 665-66 (N.D. Ill. 2006), and Defendants provide no basis to revisit it. *See Moriarty v. Svec,* 429 F.3d 710, 722-23 (7th Cir. 2005) (courts will not reopen already decided issues unless decision is "clearly erroneous and would work a manifest injustice"); *see also Power v. Summers,* 226 F.3d 815, 820 (7th Cir. 2000) ("Any deprivation under color of law that is likely to deter the exercise of free speech, whether by an employee or anyone else, is actionable").

2. IAD and Sheriff's Office Investigators

a. Timothy Kaufmann[4]

Fairley's First Amendment claim against Sheriff's Office Investigator Timothy Kaufmann is premised on Kaufmann's investigation into the Lipscomb assault. More specifically, Fairley contends that his protected speech concerning the SI-2 incident was a motivating factor behind Kaufmann's retaliation of falsifying the Lipscomb investigation report. Fairley supports his argument with evidence that Kaufmann falsely stated in his final report that the Assistant States Attorney informed Kaufmann that he would not pursue felony

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[4] Because there is no evidence that Defendant Kaufmann harassed Gackowski, Gackowski voluntarily dismisses Kaufmann from Count I.

charges against Lipscomb based on Fairley's inconsistent statements. (*See* Defs.' Stmt. Facts ¶ 302.) Construing the facts and all reasonable inferences in a light most favorable to Fairley, Fairley has presented competent evidence in the form of Kaufmann's and Park's deposition testimony that Fairley informed them of his suspicion that he was being retaliated against for the July 29, 2000 incident. Fairley also has presented Assistant States Attorney Park's deposition testimony in which Parks denied that he said that the States Attorney would not bring charges against Lipscomb based on Fairley's inconsistent statements. This evidence creates a genuine issue of material fact that Fairley's protected speech about the SI-2 incident was a motivating factor behind Kaufmann falsifying the Lipscomb report. *See Spiegla v. Hull,* 371 F.3d at 942. Finally, Kaufmann's argument that Fairley does not have a constitutional right to a police investigation into the Lipscomb assault does not save the day because Fairley's present constitutional claim is based on his protected speech under the First Amendment and not Kaufmann's failure to properly perform a police investigation.

b. Saul Weinstein[5]

Next, Gackowski contends that his protected speech was a motivating factor behind Weinstein's retaliation, specifically, Weinstein's alleged efforts to hinder the investigation into Gackowski's IAD complaint. Gackowski claims that there was no reason for Weinstein to put his IAD complaint on hold pending the Illinois Human Rights Department's investigation into his sexual harassment

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[5] Because there is no evidence in the record that Defendant Weinstein harassed Fairley, Fairley voluntarily dismisses Defendant Weinstein from Count I.

complaint. In support, Gackowski points to evidence that Weinstein sent his IAD complaint back to Andrews even though Andrews was one of the subjects of the complaint. Gackowski also presents competent evidence that Andrews berated him and threatened to sue him after Weinstein returned the IAD complaint to him. Finally, Weinstein's argument that he was not aware of Gackowski's constitutionally protected speech is rebutted by the fact that Weinstein received and reviewed Gackowski's IAD complaint which included such information. As such, viewing the evidence in favor of Gackowski, there is a genuine issue of material fact that Gackowski's protected speech was a motivating factor behind Weinstein's delaying the IAD investigation and Weinstein's returning the IAD complaint to Andrews. Accordingly, the Court denies Weinstein's Motion for Summary Judgment as to Count I of the Second Amended Complaint.

c. Gregory Ernst

Last, Plaintiffs fail to develop their conclusory allegation that their protected speech was a motivating factor in Internal Affairs Investigator Ernst's harassment or retaliation. Specifically, Plaintiffs argue that Ernst did not protect them after they reported inmate abuse and the resultant harassment, but instead lied, intimidated Gackowski, and generally hindered Plaintiffs' efforts to speak out. Plaintiffs, however, do not point to facts in the record supporting these allegations. Further, Plaintiffs argue that Ernst falsely reported to Weinstein that Gackowski filed a harassment complaint with the Illinois Human Rights Department, but in fact, Gackowski did file such a complaint and also a charge of discrimination with the EEOC. (Pls.' Stmt. Add'l Facts ¶¶ 327-30; Defs.' Stmt. Facts ¶ 159.) Simply put, Plaintiffs do not point to definite, competent evidence supporting their argument that

their protected speech was the motivating factor behind Ernst's alleged retaliation. *See Butts*, 387 F.3d at 924; *see also Corley v. Rosewood Care Center, Inc. of Peoria*, 388 F.3d 990, 1001 (7th Cir. 2004) (court will not root through thousands of pages of record to make case for plaintiffs). Considering the evidence and all reasonable inferences in a light most favorable to Plaintiffs, they have not established a genuine issue of material fact as to their claim against Ernst. Therefore, the Court grants Ernst's Motion for Summary Judgment as to Count I.

C. Defendants' Rebuttal

In their initial briefs, Defendants do not argue that they would have taken the same action in the absence of Plaintiffs' protected speech, and thus Defendants have waived this argument for purposes of their summary judgment motions.[6] *See Doherty v. City of Chicago*, 75 F.3d 318, 324 (7th Cir. 1996) ("Given our adversary system of litigation, it is not the role of this court to research and construct the legal arguments open to parties, especially when they are represented by counsel.") (citation omitted); *see also Estate of Moreland v. Dieter*, 395 F.3d 747, 759 (7th Cir. 2005) ("Perfunctory or undeveloped arguments are waived.").

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[6] In his reply brief, Weinstein contends that he would have acted identically in the absence of Gackowski's protected speech, although Weinstein does not address the issue of returning the IAD complaint to Andrews, a named subject in Gackowski's complaint. In any event, arguments raised for the first time in a parties' reply brief are waived because the non-movant has had no opportunity to respond. *See Kelso v. Bayer Corp.*, 398 F.3d 640, 643 (7th Cir. 2005).

Because Plaintiffs' speech is protected under the *Connick-Pickering* test and Plaintiffs have presented competent, specific evidence creating a genuine issue of fact regarding their speech being the motivating factor in the alleged retaliation and harassment, the Court denies Andrews', Byrne's, Coffey's, Prohaska's, Bercasio's, Fermaint's, Weinstein's, and Kaufmann's Summary Judgment Motions as to Count I of the Second Amended Complaint. The Court grants Loizon's and Ernst's Motions for Summary Judgment as to Count I.

II. Plaintiffs' Monell Claim Against Sheriff Sheahan

Plaintiffs contend that the "code of silence" at the CCDOC is a deeply ingrained, unwritten mandate that CCDOC correctional officers do not report other employees' misconduct, especially concerning allegations of excessive force and inmate abuse. As such, Plaintiffs assert that violators of the code of silence are subject to harassment and intimidation ranging from name calling to physical threats. Based on the code of silence, Plaintiffs contend that Sheriff Sheahan, in his official capacity, is liable for their constitutional injuries.[7]

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[7] Plaintiffs' First Amendment claims against the individual Defendants in their official capacities are actually claims against the Sheriff's Office as a local governmental unit. *See Kentucky v. Graham*, 473 U.S. 159, 165-66, 105 S.Ct. 3099, 3105, 87 L.Ed.2d 114, 121 (1985) (citing *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 690, n.55, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978)). In other words, official capacity suits brought against individuals are "another way of pleading an action against an entity of which an officer is an agent." *Kentucky v. Graham*, 473 U.S. at 165 (citation omitted). Accordingly, Sheriff Sheahan is the only proper Defendant in Plaintiffs' *Monell* claim.

To establish liability against Sheriff Sheahan in his official capacity under 42 U.S.C. § 1983, Plaintiffs must show that (1) they suffered a deprivation of a federal right,[8] (2) as a result of either an express municipal policy, widespread custom, or deliberate act of a decision-maker with final policy-making authority, which (3) proximately caused their constitutional injuries. *Ovadal v. City of Madison,* 416 F.3d 531, 535 (7th Cir. 2005). Under the second requirement, Plaintiffs must establish that an official custom or policy caused the deprivation of their constitutional rights. *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 690-91 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978). To show that an official custom or policy caused the violation of such rights, Plaintiffs must establish one of the following scenarios: (1) there was an express policy that, when enforced, causes a constitutional deprivation; (2) there was a widespread practice that, although not authorized by written law or express policy, is so permanent and well-settled that it constitutes custom or usage within the force of law; or (3) a person with final policymaking authority caused the constitutional injury. *Calhoun v. Ramsey,* 408 F.3d 375, 379 (7th Cir. 2005).

A. Widespread Practice

Plaintiffs contend that the code of silence was so permanent and well-established that it constituted custom or usage within the force of law under the second *Monell* prong. Because Plaintiffs bear the burden of proving the code of

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[8] Sheriff Sheahan makes no arguments as to whether Plaintiffs suffered a deprivation of a federal right. The Sheriff has therefore waived any such argument. *Estate of Moreland v. Dieter,* 395 F.3d 747, 759 (7th Cir. 2005) ("Perfunctory or undeveloped arguments are waived.").

silence at trial, Plaintiffs must set forth specific facts showing that there is a genuine issue of material fact regarding the existence of the code of silence. *See Palmer v. Marion County,* 327 F.3d 588, 595 (7th Cir. 2003) (citing *Celotex Corp. v. Catrett,* 477 U.S. 317, 324, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986)). "When a plaintiff chooses to challenge a municipality's unconstitutional policy by establishing a widespread practice, proof of isolated acts of misconduct will not suffice; a series of violations must be presented to lay the premise of deliberate indifference." *Palmer,* 327 F.3d at 595-96 (citing *City of Oklahoma City v. Tuttle,* 471 U.S. 808, 823-24, 105 S.Ct. 2427, 85 L.Ed.2d 791 (1985)). Thus, under the *Monell* widespread practice theory, Plaintiffs must establish an unconstitutional pattern of conduct, including incidents other than ones involving them, to give rise to the inference that an unconstitutional custom, policy, or practice exists. *See Tabor v. City of Chicago,* 10 F.Supp.2d 988, 993 (N.D. Ill. 1998); *see also Palmer,* 327 F.3d at 595-96 (plaintiff failed to set forth sufficient proof of widespread practice based on failure to present evidence other than incident in which he was involved).

Here, Plaintiffs assert that "there is overwhelming evidence to support the inference of a widespread custom of concealing mistreatment of prisoners and harassing officers who are perceived to be or who actually refuse to participate in the concealment of the mistreatment of prisoners." (R. 549-1, Pls.' Resp. to Sheahan's Mot. Summ. J. at 1.) Sheahan, on the other hand, contends that Plaintiffs have not set forth facts establishing that the correctional officers subjected other CCDOC employees to harassment or retaliation pursuant to the code of silence.

Besides Plaintiffs' evidence concerning their own experiences with the code of silence, Plaintiffs have also

produced specific, competent evidence establishing a genuine issue of material fact regarding the existence of the code of silence as applied to other correctional officers. Plaintiffs, for example, present the deposition testimony of Charles Holman, who was an Investigator in the Internal Affairs Department from 1993 to 2003. (Pls.' Stmt. Add'l Facts ¶ 423). The pertinent part of Holman's deposition states:

> Q: Are you aware of any officers who have filed claims of harassment with IAD where they're claiming that they were harassed for reporting other officers?
>
> A: Yes.
>
> Q: What officers?
>
> A: I've done over 400 investigations. I can't think of everybody's name. But it's a common occurrence. When you have witnesses that go against the grain and testify truthfully in these statements and in their investigations, they're routinely harassed by supervisors, by other officers.

(Pls.' Stmt. Add'l Facts ¶¶ 423, 424, Pls.' Ex. 22, Holman Dep. at 461-62.) Holman then remembered that he personally investigated a specific incidence and individual who experienced such harassment and gives an explanation of the situation. (*Id.*, Pls.' Ex. 22, Holman Dep. at 462-65.) Although Defendants assert that Holman's testimony amounts to inadmissible hearsay, speculation, and opinion, and argues that it lacks a proper foundation, Defendants fail to explain why Holman's testimony is such. Nevertheless, although hearsay is inadmissible at summary judgment as well as trial, *see Eisenstadt v. Centel Corp.*, 113 F.3d 738, 742 (7th Cir. 1997), Holman's testimony is based on his own personal

knowledge of incidents that he investigated, as well as his ten years working as an IAD investigator. *See* Fed.R.Evid. 602 ("A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter."); *see also United States v. Joy,* 192 F.3d 761, 767 (7th Cir. 1999) ("Because most knowledge is inferential, personal knowledge includes opinions and inferences grounded in observations or other first-hand experiences."). While the individuals' comments to Holman during the course of his investigations may not be admissible for the truth of the matter, Holman's investigative activity and lay person opinions based on such activity would be admissible. Therefore, Defendants' evidentiary objections fail.

Plaintiffs also present deposition testimony of a former correctional officer, Ricky Rodriguez, who worked in Division I from 1998 to 2003. (Pls.' Stmt. Add'l Facts ¶ 41.) Rodriguez's deposition testimony states in relevant part:

> Q: Have you ever reported any instance of an officer using excessive force on an inmate?
>
> A: No, I haven't.
>
> Q: Why not, if you witnessed it?
>
> A: One of the things that they teach us is that we as officers, we are the men in blue, the officers in blue, and the inmates are in brown. We have to stick with our own kind. Basically you can't go against us because they are going to go against you anyway, so there is that kind of like code of silence.

Q: Who taught you this kind of code of silence that you just testified to?

A: This code of silence, it's taught in the Academy.

Q: I thought when we went through the general orders, the general orders provide that if you see a correctional officer using excessive force on an inmate, you are ethically obligated to report it. Do you recall reviewing a general order providing that?[9]

A: Yes, I did.

Q: Do you recall you testifying you abided by the general orders when you were a correctional officer?

A: I said that. But if any officer within the jail sees a beating, nobody is going to tell about it, or if not a beating, they will witness an inmate getting slapped, sucker punched, even while he is cuffed and shackled. It may not be an aggressive beating. Everybody witnesses and nobody talks about it.

(*Id.*, Pls.' Ex. 33, Rodriguez Dep., at 208-09.)

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[9] Sheriff Sheahan argues that the CCDOC General Orders' requirement that all correctional officers must report other officers' misconduct refutes Plaintiffs' argument that the code of silence existed. The Sheriff's argument is baseless because courts look to a governmental unit's actual practice, as opposed to its written policy, when determining whether a widespread practice exists under the second *Monell* scenario. *See Woodward v. Corr. Med. Servs. of Ill., Inc.*, 368 F.3d 917, 927 (7th Cir. 2004).

Despite Defendants' arguments to the contrary, Rodriguez's comments are based on his own personal experience at the CCDOC Training Academy and as a correctional officer at the CCDOC. *See* Fed.R.Evid. 602; *see also United States v. Joy,* 192 F.3d at 767. As the Seventh Circuit has explained "inferences reached from a witness's observations need not reach the level of absolute certainty to be admissible. Rather, the key question for the trial court is whether a reasonable trier of fact could believe that a witness had personal knowledge of the facts about which he testified." *Joy,* 192 F.3d at 767 (internal citation omitted).

Meanwhile, Plaintiffs have set forth competent evidence of additional incidences to support their theory that the widespread practice of the code of silence existed, including Sergeant Arthur Perry reporting a separate incident of inmate abuse and the resultant harassment. (Pls.' Stmt. Add'l Facts ¶¶ 126-129, 135, 138; Defs. Stmt. Facts ¶¶ 294-96.) The Court need not discuss the details of these additional instances because considering the facts and all reasonable inferences in Plaintiffs' favor, Rodriguez's and Holman's testimony sufficiently establishes that there is a genuine issue of material fact for trial concerning the existence of the code of silence. *See Palmer,* 327 F.3d at 595.

B. Force of Law

Next, the Court must determine whether the code of silence had the "force of law." There are two routes Plaintiffs may take to establish that the code of silence has the force of law. *See Woodward v. Corr. Med. Servs. of Ill., Inc.,* 368 F.3d 917, 927 (7th Cir. 2004); *Gable v. City of Chicago,* 296 F.3d 531, 538 n.3 (7th Cir. 2002). First, municipal customs have the force of law if the custom itself is unconstitutional. *Woodward,* 368 F.3d at 927; *Gable,* 296 F.3d at 538 n.3.

Second, Plaintiffs may indirectly establish that the custom or policy has the force of law "by showing a series of bad acts and inviting the court to infer from them that the policymaking level of government was bound to have noticed what was going on and by failing to do anything must have encouraged or at least condoned, thus in either event adopting, the misconduct of subordinate officers." *Woodward,* 368 F.3d at 927 (citing *Estate of Novack* ex rel. v. County of Wood, 226 F.3d 525, 530 (7th Cir. 2000) (citation omitted)).

Plaintiffs choose the second route, and therefore, must establish that Sheriff Sheahan was deliberately indifferent to the fact that the code of silence's known or obvious consequences would result in the deprivation of a constitutional right. *Gable,* 296 F.3d at 537-38 (citing *Board of County Comm'rs v. Brown,* 520 U.S. 397, 406-07, 117 S.Ct. 1382, 137 L.Ed.2d 626 (1997)); *see also City of Canton v. Harris,* 489 U.S. 378, 388-89, 109 S. Ct. 1197, 103 L. Ed. 2d 412 (1989). In other words, this "culpability" standard requires a showing of the Sheriff's conscious disregard of the policy's known or obvious dangers. *Armstrong v. Squadrito,* 152 F.3d 564, 577 (7th Cir. 1998); *West v. Waymire,* 114 F.3d 646, 651 (7th Cir. 1997). In *Waymire,* the Seventh Circuit explained that "a deliberate choice to avoid an obvious danger ... is actionable under 42 U.S.C. § 1983 if the choice results in harm to a protected interest, even though the defendant obtusely lacks actual knowledge of the danger." *Id.* at 651. Thus, Plaintiffs need not show that Sheriff Sheahan had actual knowledge of the danger concerning the code of silence to establish their claim under *Monell. See id.*

In support of their argument that Sheriff Sheahan was deliberately indifferent to the fact that the code of silence's known or obvious consequences would result in the deprivation of a constitutional right, Plaintiffs have presented

evidence concerning the inadequacy of the reporting mechanisms within CCDOC. First, they have presented evidence creating a genuine issue of material fact that Sheriff Sheahan did not properly supervise investigations of officer misconduct. Plaintiffs base their argument on Sheriff Sheahan's deposition testimony that he never reviewed IAD investigations as required under General Order 4.1. (Pls.' Stmt. Add'l Facts ¶¶ 449, 450.) Under General Order 4.1, the IAD is under the direction of the Sheriff of Cook County. (*Id.* ¶ 443.) Also pursuant to this General Order, after an investigator conducts an independent investigation and "sustains" the allegations, IAD sends the Sheriff copies of the investigation. (*Id.* ¶¶ 444-46.) Despite General Order 4.1, Sheriff Sheahan testified at his deposition that he has never received any reports of excessive force allegations or written reports from IAD containing information regarding their investigations, except for recommendations regarding termination. (*Id.* ¶¶ 449, 450.) Although Defendants counter with the fact that the Undersheriff and Inspector General review all investigations, Plaintiffs have presented Sheriff Sheahan's deposition testimony that he did not receive any written reports from the Inspector General about such investigations. (*Id.* ¶ 451.)

Also, Plaintiffs set forth additional evidence creating a genuine issue of material fact concerning the inadequacy of the reporting mechanisms within the CCDOC. Plaintiffs, for example, have presented evidence that officers routinely failed to report various incidents at the CCDOC and that IAD supervisors sometimes requested IAD investigators to change their findings. (*Id.* ¶¶ 470, 474; Pls.' Ex. 22, Holman Dep. at 170-71.) Viewing the facts and all reasonable inferences in favor of Plaintiffs, there is a genuine issue of material fact that Sheriff Sheahan was deliberately indifferent that the code of silence's known or obvious consequences would result in the

deprivation of a constitutional right based on the inadequacy of the reporting mechanisms within the CCDOC.

As the Supreme Court explained in *Board of County Comm'rs v. Brown,* "[i]f a program does not prevent constitutional violations, municipal decisionmakers may eventually be put on notice that a new program is called for. Their continued adherence to an approach that they know or should know has failed to prevent tortious conduct by employees may establish the conscious disregard for the consequences of their action -- the 'deliberate indifference' -- necessary to trigger municipal liability." *Id.* at 407. Here, Plaintiffs have set forth competent evidence to create a genuine issue of material fact that the CCDOC's inadequate reporting mechanisms failed to prevent its correctional officers from committing constitutional torts.

C. Causal Link

Finally, Plaintiffs must establish a direct causal link between the alleged code of silence and their constitutional injuries, namely, that the code of silence was the "moving force" behind their constitutional deprivation. *Canton v. Harris,* 489 U.S. 378, 389, 109 S.Ct. 1197, 1208-09, 103 L.Ed.2d 412 (1989); *Arlotta v. Bradley Ctr.,* 349 F.3d 517, 522 (7th Cir. 2003). "Moving force" is "when execution of a government's policy or custom ... inflicts the injury that the government as an entity is responsible under § 1983." *Estate of Novack,* 226 F.3d at 531 (quoting *Monell,* 436 U.S. at 694); *see also Woodward,* 368 F.3d at 928.

Construing the evidence and all reasonable inferences in a light most favorable to Plaintiffs, they have presented definite, competent evidence creating a genuine issue of material fact that they were harassed and retaliated against for

breaking the code of silence. Fairley, for example, testified that on July 29, 2000 he saw correctional officers beat inmates in SI-2 and consequently told the officers to stop beating the inmates. After these inmates filed a lawsuit in state court, Plaintiffs informed other correctional officers and Division I personnel that they would tell the truth if asked about the July 29, 2000 incident. Both Fairley and Gackowski testified that after the July 29, 2000 incident, certain correctional officers and supervisors harassed and retaliated against them by "dry humping" them, calling them inmate lovers, physically threatening them, and falsifying reports about them.

Accordingly, Sheriff Sheahan has failed in his burden of establishing the lack of any genuine issue of material fact as to Plaintiffs' *Monell* claim. *See Celotex Corp. v. Catrett,* 477 U.S. at 323. The Court thus denies Sheriff Sheahan's Motion for Summary Judgment.

III. Civil Conspiracy Claim -- Count II

Finally, Plaintiffs allege that Defendants conspired to deprive them of their constitutional right to free speech. To establish a Section 1983 claim through a civil conspiracy theory, Plaintiffs must demonstrate that (1) Defendants had an express or implied agreement to deprive Plaintiffs of their constitutional rights, and (2) Plaintiffs were deprived of their constitutional rights by Defendants' overt actions in furtherance of the agreement. *Williams v. Seniff,* 342 F.3d 774, 782 (7th Cir. 2003); *Scherer v. Balkema,* 840 F.2d 437, 442 (7th Cir. 1988). "To be liable as a conspirator you must be a voluntary participant in a common venture, although you need not have agreed on the details of the conspiratorial scheme or even know who the other conspirators are. It is enough if you understand the general objectives of the scheme, accept them, and agree, either explicitly or

implicitly, to do your part to further them." *Jones v. City of Chicago,* 856 F.2d 985, 992 (7th Cir. 1988).

Defendants contend that Plaintiffs have failed to set forth any evidence creating a genuine issue of material fact that Defendants reached an agreement to deprive Plaintiffs of their First Amendment rights. The Court agrees. Although Plaintiffs may establish a conspiracy through circumstantial evidence, such evidence cannot be speculative. *Seniff,* 342 F.3d at 785. As such, a civil conspiracy claim cannot survive summary judgment if the arguments and supporting evidence are "vague, conclusionary and include no overt acts reasonably related to the promotion of the alleged conspiracy." *Amundsen v. Chicago Park Dist.,* 218 F.3d 712, 718 (7th Cir. 2000) (citation omitted).

Here, Plaintiffs' entire conspiracy argument consists of one paragraph, in which they make the following conclusory statement: "Accepting plaintiffs' facts as true, which the Court must do on summary judgment, there is no option but to find sufficient evidence of a conspiracy to engage in actions calculated to hinder plaintiffs' efforts to speak out and to discredit them when they did." (R. 553-2, Pls.' Corrected Resp. at 46.) This argument alone does not raise a genuine issue of material fact as to Plaintiffs' conspiracy claim. Therefore, the Court grants the Defendants' Motion for Summary Judgment as to Count II of the Second Amended Complaint.

CONCLUSION

For these reasons, the Court grants in part and denies in part Defendant Sheriff Michael Sheahan's Motion for Summary Judgment. [R. 435-1.] The Court grants in part and denies in part Defendant Edward Byrne's and Defendant

Dennis Andrews' Motions for Summary Judgment. [R. 429-1, 450-1.] Further, the Court grants in part and denies in part Defendants Evan Fermaint's, Noberto Bercasio's, Fred Coffey's and Ronald Prohaska's Motion for Summary Judgment. [R. 449-1.] The Court grants Defendant Juan Diaz's, Defendant Patrick Loizon's, and Gregory Ernst's Motions for Summary Judgment in their entirety. [R. 432-1, 433-1, 456-1.] Last, the Court grants in part and denies in part Defendant Timothy Kaufmann's and Saul Weinstein's Motion for Summary Judgment. [R. 434-1, 436-1.]

Date: May 4, 2006

ENTERED

/s/
AMY J. ST. EVE
United States District Court Judge

APPENDIX E

UNITED STATES DISTRICT COURT
FOR THE Northern District of Illinois
Eastern Division

Case No.: 1:03-cv-05207

[Filed May 4, 2006]

Roger Fairley, et al.	)
Plaintiff,	)
	)
v.	)
	)
Dennis Andrews, et al.	)
Defendant.	)
	)

NOTIFICATION OF DOCKET ENTRY

This docket entry was made by the Clerk on Thursday, May 4, 2006:

MINUTE entry before Judge Amy J. St. Eve :Defendant Sheriff Michael Sheahan's Motion for Summary Judgment [435] is granted in part and denied in part. Defendant Edward Byrne's and Defendant Dennis Andrews' Motions for Summary Judgment [429] [450] are granted in part and denied in part. Defendants Evan Fermaint's, Noberto Bercasio's, Fred Coffey's and Ronald Prohaska's Motion for Summary Judgment [449] are granted in part and denied in part.

Defendant Juan Diaz's, Defendant Patrick Loizon's, and Gregory Ernst's Motions for Summary Judgment [432] [433] [456] are granted. Last, the Court grants in part and denies in part Defendant Timothy Kaufmann's and Saul Weinstein's Motion for Summary Judgment [434] [436]. Mailed notice.(tmh,)

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